NUMBER 01-23-00008-CV

IN IN THE COURT OF APPEALS FOR THE FIRST JUDICIAL DISTRICT HOUSTON TEXAS

GEORGE M. BISHOP,

Appellant,

v.

ROBERT G. PATE AND JUDY K. PATE,

Appellees.

On Appeal from

the 434th District Court of

Fort Bend County

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This is a Trespass to Try Title case filed in the 434th District Court of Fort Bend County on July 25, 2017, by a Texas based Trust named T.H. Trust in which David Hamilton was Trustee. (CR-07) The case involves an unimproved plot consisting of 4.7695 acres which T.H. Trust purchased at a foreclosure sale on November 6, 2007. (CR- 301) After many years of litigation, T.H. Trust owed a considerable amount for attorney fees and borrowed additional funds from Appellant through a note and deed of trust on June 21, 2021. T.H. Trust was unable to pay the note resulting in Appellant, George Bishop foreclosing on T.H. Trust on December 7, 2021. Appellant purchased the property at the foreclosure sale for a $25,000. 00 credit on the note. (CR-361) Appellant is the current owner of the property.

Appellees are Robert and Judy K. Pate, residents of Fort Bend County. They purchased the interest of JAB Development Corporation in the property after that interest if any was subject to a lien filed by the Internal Revenue Service on February 12, 2013. (CR-292-3) That interest was sold to Appellees through a Quitclaim Deed from the Internal Revenue Service on September 19, 2017. The Quitclaim Deed transferred the interest, if any of JAB Development Corporation in the property to Appellees. (CR-297)

Various Motions for Summary Judgment were filed and heard by the Associate Judge, Argie Brame over the objection of Appellant. (CR-337) On February 4, 2022, Judge Brame denied an Amended Motion for No-Evidence Summary Judgment that had been filed on April 28, 2021 by T.H.Trust. (CR-365) On the same day, Associate Judge Brame also granted in part Appellees' Motion for Summary Judgment that had been filed on February 8, 2021 along with their Counterclaim and Cross-Claim against Hamilton and Appellant. (CR-367) Appellees then filed a motion to Clarify the Order Granting their Motion for Summary Judgment on August 1,

2022. (CR-377) This motion was never ruled upon. The Appellant filed a Notice of Appeal pursuant to Tex. Gov't. Code Section 54A.111(b) and Request for the Elected Judge to Hear All Pending Motions on August 8, 2022. (CR-384) On September 16, 2022 the Associate Judge then denied the Motion to Set Aside the Order Granting Summary Judgment. (CR404)

A Final Judgment was signed on December 28, 2022. (CR-460) Appellant filed a Notice of Appeal on January 4, 2023, and perfected this appeal. (CR-466)

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes this case can be resolved on the briefs and that oral argument is not necessary.

ISSUES PRESENTED

1. DOES THE PURCHASER OF WHATEVER INTEREST ANOTHER HAS IN CERTAIN PROPERTY THROUGH A QUITCLAIM DEED IN 2017 GRANT STANDING TO THE PURCHASER TO QUESTION A TRUSTEE'S DEED FORECLOSING ON THE PREVIOUS OWNER OF THE SAME PROPERTY IN 2007?
2. DID THE ASSOCIATE JUDGE ERR IN GRANTING SUMMARY JUDGMENT HOLDING THAT APPELLEES WERE THE OWNERS OF THE PROPERTY IN QUESTION?
3. AFTER AN OBJECTION TO AN ASSOCIATE JUDGE HEARING A SUMMARY JUDGMENT MOTION WAS FILED MAY THE ASSOCIATE JUDGE PROCEED TO HEAR AND DECIDE THE MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF FACTS

The Clerk's Record shows the foreclosure on November 7, 2007, was conducted by Appellant's son, Kevin Bishop as Substitute Trustee (CR-276) for Mulligan Medical Consultants, LLC. That entity was owed $400,000.00 by Grand Parkway Equities, Ltd. which was secured by a note and deed of trust dated August 9, 2005. (CR- 241) The note had been assigned to Appellant. (CR- 221, 285) The foreclosure extinguished the interest of Grand Parkway Equities, Ltd., a limited partnership. That entity had borrowed $400,000.00 from Mulligan Medical Consultants, LLC on August 9, 2006. (CR-265) Grand Parkway Equities, Ltd. never sued to void the foreclosure and never made any payment on the note.

T.H. Trust was the high bidder at the foreclosure sale, however the Trustee's Deed was lost and not recorded until October 2, 2017. (CR-301)

In the meantime, the Internal Revenue Service seized the interest of JAB Development Company in the same property but sold the interest of JAB Development Corporation on March 16, 2017 to Appellees for $176,000.00. (Ex. 10 to Appellees Motion for Summary Judgment, CR-295) The Internal Revenue Service then issued to Appellees a Quitclaim Deed on September 19, 2017 to the same property that conveyed the interest of JAB Development Corporation. (CR-297) The record does not show the connection, if any between JAB Development Corporation and JAB Development Company.

T.H. Trust had purchased at the foreclosure sale ten years earlier the same property! An Abstract of Property was filed on July 30, 2020 showing the ownership of the property back to the Republic of Mexico as requested in the ongoing trespass to try title case. The abstract does not show that JAB Development Corporation ever owned the property. (CR-137-215)

The Appellees filed a First Amended Counterclaim and Cross-Claim on February 8, 2021 complaining of both David Hamilton and Appellant. (Supp.CR-252) On the same day, Appellees filed their Motion for Summary Judgment. (CR-216) A response was filed by Appellant and David Hamilton on April 5, 2021. An Objection to the Associate Judge hearing the motion was filed on April 14, 2021. (CR-337) The Associate Judge however overruled this objection herself on June 4, 2021. (CR-357) David Hamilton filed his answer to the Counterclaim on April 27,2021. (CR-347) A Supplemental Counterclaim was filed by Appellant on January 18, 2022. (CR-361) This was answered on February 11, 2022 by Appellees. (CR 373)

Previously, the Associate Judge denied Hamilton's Amended Motion for No-Evidence Summary Judgment on February 4, 2022. (CR-365) This was the same day that she had granted Appellees' Motion for Summary Judgment on February 4, 2022. (CR-367) Appellees then filed a Motion for Clarification of the Summary Judgment Order on August 1, 2022. (CR-377) This motion was granted on September 16, 2022. (CR-16, 2022)

The Appellees filed a Motion for Summary Judgment on Claims Asserted by Appellee on September 27, 2022 on the basis of the law of the case. (CR-410) Appellant requested a de novo hearing pursuant to Tex. Gov't. Code 54A.111(b) on December 6, 2022. (CR-454) Before a ruling on that could be made, a final judgment declaring the Appellees to be the owners of the property in question was signed on December 28, 2022. (CR-460) Appellant filed a Notice of Appeal on January 4, 2023. (CR-466)

SUMMARY OF THE ARGUMENT

1. DOES THE GRANTEE OF A QUITCLAIM DEED PURPORTING TO CONVEY WHATEVER INTEREST, A CORPORATION HAD IN A PARCEL OF REAL ESTATE HAVE STANDING TO CONTEST A FORECLOSURE OF A DEED OF TRUST REGARDING THE SAME PROPERTY WHICH OCCURRED BETWEEN DIFFERENT PARTIES TEN YEARS BEFORE?

2. DOES AN ASSOCIATE JUDGE HAVE THE POWER TO GRANT A MOTION FOR SUMMARY JUDGMENT OVER THE WRITTEN OBJECTION OF ONE OF THE PARTIES?

3. DOES A DISTRICT JUDGE THAT REFERS PENDING ISSUES TO AN ASSOCIATE JUDGE FOR DECISIONS HAVE TO HOLD DE NOVO HEARINGS UPON A PARTY TIMELY APPEALING THE RULINGS OF THE ASSOCIATE JUDGE?

ARGUMENT

I. POINT ONE

APPELLEES AS THE GRANTEES OF A QUITCLAIM DEED IN 2017 HAD NO STANDING TO ATTACK THE FORECLOSURE IN 2007 THAT FORECLOSED ON THE INTEREST OF GRAND PARKWAY EQUITIES, LTD.

The foreclosure that took place in 2007 did not involve Appellees. (CR-265) The Appellees' Motion for Summary Judgment filed on February 8, 2021 along with their Counterclaim and Cross-Claim violated Rule 166a(a) of the Texas Rules of Civil Procedure as it was filed before the Counter-Defendant or Cross-Defendant had even been served or had answered. (CR-216)

Over the Objection of Appellant to the Associate Judge hearing this motion, the motion was granted by the Associate Judge on February 4, 2022. (CR-367) In this order, the Associate Judge ruled fifteen years after the foreclosure that the Foreclosure Deed relating to the foreclosure in 2007 of the interest of Grand Parkway Equities, Ltd. was "null, void and of no effect". (CR-369)

Standing, a component of subject matter jurisdiction, is a constitutional prerequisite to maintaining suit under Texas law. *Tex. Ass'n. of Bus. v. Tex. Air Control Bd*., 852 S.W. 2d 440, 444-45 (Tex. 1993); *Concerned Cmty. Involved Def. Inc. v. City of Houston*, 209 S.W. ed 666,670 (Tex. App.-Houston [14th Dist.] 2006, pet. denied)

Standing requires that there exists a real controversy between the parties that will actually be determined by the judicial declaration sought. *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W. 2d 659, 662 (Tex. 1996) There was no real controversy between Grand Parkway Equities and either Appellant or T.H. Trust. It was never shown that JAB Development Corporation whose interest Appellees purchased ever had an interest in the property in question.

Only the party whose primary legal right has been breached may seek redress for the injury. *Nauslar v. Coors Brewing Co*., 170 S.W. 3d 242,249 (Tex. App.-Dallas 2005, no pet.) If any party's rights had been breached, it was the rights of Grand Parkway Equities, Inc. Without a breach of a legal right belonging to a specific party, that party has no standing to litigate. *Cadle Co. v. Lobingier*, 50 S.W. 3d 662, 669-70 (Tex. App.-Fort Worth 2001, pet. denied) There was no summary judgment evidence that JAB Development Corporation ever had any legal rights to the property.

The rights of the Appellees depended on JAB Development Corporation having an interest in the property at the time of the foreclosure. Without a breach of a legal right belonging

to a JAB Development Corporation, the Appellees had no standing to litigate. *Hodges v. Rajpal*, 459 S.W. 3d 237, (Tex. App.-Dallas 2015, no pet.) As holders of JAB's former interest, Appellees stood in their shoes in this litigation. *Rogers v. Ricane Enters. Inc.*, 884 S.W. 2d 763,769 (Tex. 1994) The Quitclaim Deed did not convey an interest in the land, but whatever interest JAB Development Corporation had, if any at the time of the seizure by the Internal Revenue Service. *Geodyne Energy Income Production Partnership I-E v, The Newton Corporation*, 161 S.W. 3d 482,487 (Tex. 2005)

Standing cannot be waived and can be raised for the first time on appeal. *Tex. Ass'n. of Bus.* 852 S.W. 2d at 444-45 However, Appellant raised the issue of standing in his Response to the Motion for Summary Judgment in paragraph V. (CR-321) In spite of this issue being raised, the foreclosure in 2007 against Grand Parkway Equities was ruled "void" by the Associate Judge and Appellees were determined to be the owners in fee simple of the property in question based on their Quitclaim Deed which conveyed the interest, if any, of JAB Development Corporation. (CR-369) However, the Property Abstract (CR-137-215) which has the purpose of showing good title does not show that JAB Development Corporation ever owned this parcel of property. See *Friedrich v. Seligmann*, 22 S.W. 2d 749, 752 (Tex. Civ. App.-San Antonio1929, writ dis'm.)

Whether or not the Appellees have standing to claim that the foreclosure deed for the foreclosure in 2007 is a question of law reviewed de novo. *Mayhew v. Town of Sunnyvale*, 964 S.W. 2d 922, 928 (Tex. 1998) Appellees have no standing to challenge the foreclosure deed foreclosing on Grand Parkway Equities, Ltd. regardless of when the foreclosure deed was filed. (CR-301) A person has standing to sue only when he is personally aggrieved by the alleged wrong. *Hall v. Douglas*, 380 S.W. 3d860, 872 (Tex. App.-Dallas 2012, no pet.) Neither JAB Development Corporation nor Appellees were personally aggrieved by the foreclosure in 2007.

The summary judgment order holding that the foreclosure deed was "void" means that Grand Parkway Equities, Ltd. still owns the property in question, although Grand Parkway Equities was never a party to this litigation. See *Chale Garza Inv. V. Madaria*, 931 S.W. 2d 597, 600 (Tex. App.-San Antonio 1996, writ denied)

Appellees had no standing to contest the 2007 foreclosure and the order voiding the foreclosure sale in 2007 was not only improper but beyond the Associate Judge's authority.

II. POINT TWO

THE TRIAL COURT ERRED IN REFUSING TO REVIEW DE NOVO THE RULINGS OF THE ASSOCIATE JUDGE

Appellant had the statutory right to appeal the ruling of the Associate Judge to the referring court after receiving notice of the Associate Judge's ruling. Tex. Gov't. Code 54A.111(a) Appellant appealed the ruling granting Appellees' Motion for Summary Judgment as allowed by Tex. Gov't. Code 54A.111(b). (CR-384) This appeal required the 434th District Court to consider the matter de novo. Gov't. Code 54A.111(e) The 434th District Court was required to hold the de novo hearing within thirty (30) days of when the request for de novo hearing was filed on August 8, 2022. (CR-384) During this appeal, the Associate Judge's order was no longer in effect, otherwise the statute allowing a de novo appeal would be meaningless. *Pjetrovic v. 4HG Fannin Investments, LLC*, 400 S.W. 3d 119, 124 (Tex. App.-Dallas 2013, pet. denied)

Instead of allowing a de novo hearing as requested by Appellant on July 1, 2021 (CR-358), the referring court did nothing. A subsequent Notice of Appeal was filed on August 8, 2022 (CR-384) This Notice of Appeal was "dismissed" on September 16, 2022. (CR-404) A third Notice of Appeal was filed on December 6, 2022 pursuant to Tex. Gov't Code 54A.111(b). (CR-454) This Notice of Appeal was also ignored. None of the Notices of Appeal filed pursuant

to Tex. Gov't. Code 54A.111(b) resulted in a de novo hearing as required by Sections 54A.111 or 54A.115(a).

Appellant was entitled to receive notice of the right to a de novo hearing before the referring court. See Section 54A.112 No such notice was provided.

The referring judge did "dismiss" a Notice of Appeal on September 16, 2022. (CR-404) None of the other Notices of Appeal were ever ruled on prior to summary judgment being granted on December 28, 2022. (CR-460)

Many of the problems with being able to file a timely Notice of Appeal were the persistent failures of the Fort Bend County District Clerk's in notifying Appellant of rulings by the Associate Judge. For instance, summary judgment was signed by the Associate Judge on February 4, 2022. (CR-367) Notice was sent to counsel for the Appellees on February 7, 2022. (CR-398) Notice was not sent to Appellant and counsel for David Hamilton until August 15, 2022. (CR-400) The Order granting sanctions for "research" was never sent to Appellant by the District Clerk or by the Associate Judge.

III. POINT THREE

THE ASSOCIATE JUDGE GRANTED A SUMMARY JUDGMENT IN FAVOR OF APPELLEES IN WHICH THEY HAD THE BURDEN OF PROOF AND HAD FAILED TO ESTABLISH CONCLUSIVELY THEIR ENTITLEMENT TO SUMMARY JUDGMENT

The Appellees filed their Motion for Summary Judgment on Claims Asserted by Plaintiff and Counter-Plaintiffs' Motion for Summary Judgment on Claims against Hamilton and Bishop on February 8, 2021. (CR-216) This motion sought to establish that Appellees were the owners of the property in question through a quitclaim deed from the Internal Revenue Service.

They contended that they were entitled to summary judgment on the claims filed the same day against Appellant. (CR-218) The Appellees contend that they are entitled to summary judgment because they have proven their entitlement to summary judgment as a matter of law. (CR-219) They also contended that their title was superior to that of Appellant and was out of a "common source". (CR-220)

Initially, Appellees recount the circumstances of the lien and deed of trust in favor of Mulligan Medical which was assigned to Appellant. The Mulligan note went into default on August 9,2006 according to the motion. (CR-222)

Then the Appellees recount the deed from Appellant to JAB Development Company filed in the deed records on July 16, 2009. (CR-223) There is no summary judgment evidence that Appellant ever owned an interest in the real property in question. Appellant did own the note secured by the real property but never owned the real estate during the time in question. (CR-221)

As the Appellees were contending in their Motion for Summary Judgment that they owned the property outright through their quitclaim deed, they had the burden to prove that no genuine issue of material fact exists concerning one or more essential elements of their claims to own the property as a matter of law. *M.D. Anderson Hosp. and Tumor Inst. v. Willrich*, 28 S.W. 3d 22, 23 (Tex. 2000) (per curium); *Rhone-Poulene, Inc. v. Steel*, 997 S.W. 2d 217,223 (Tex. 1999) Appellees also sought summary judgment on their defenses to the claims of Appellant in this same motion. In order to have summary judgment granted against Appellant, the Appellees must show that no genuine issue of material fact exists concerning one or more essential elements of Appellant's claims. Tex.R. Civ. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty.*

Hous. Fin. Corp., 988 S.W. 2d 746,748 (Tex.1999); *Cathey v. Booth*, 900 S.W. 2d 339, 341-42 (Tex.1995)(per curium)

The Appellees contend that the title of T.H. Trust is derived from the Coastal deed of trust in favor of Mulligan Medical Consultants, LLC. (CR-224) Then Appellees claim with no summary judgment proof that their title also stems from the Mulligan Medical lien.

To be entitled to summary judgment on their Counter-Claim, the Appellees must, except for damages, (1) establish the elements of their cause of action as a matter of law; and (2) produce evidence that would be sufficient to support an instructed verdict at trial. *Ardmore, Inc. v. Rex Grp., Inc.*, 377 S.W. 3d45,54 (Tex. App.-Houston [1st Dist.] 2012, pet. denied) The Appellants failed on both counts.

Appellees contend that the Substitute Trustee's Deed is fraudulent. (CR-227) It is not shown in the summary judgment evidence attached to the Motion for Summary Judgment why the Substitute Trustee's Deed was fraudulent, however.

The Motion for Summary Judgment contends that the "Bishop Parties" filed a fraudulent claim against the real property in question in violation of Tex. Civ. Prac. & Rem. Code section 12.001 et seq. (CR-235) They then set out some of the elements of this statute but fail to mention that this statute deals with "Liability Related to a Fraudulent Court Record". This statute requires knowledge that the "document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property". Tex. Civ. Prac. & Rem. Code section 12.003(a)(1) Vernon's 1997 A person asserting a claim under Section 12.002 has the burden to prove the requisite elements of the statute. *Aland v. Martin*, 271 S.W. 3d 424, 430 (Tex. App.-Dallas 2008, no pet.) Appellees did not produce any summary judgment evidence to prove this claim conclusively.

This claim is barred after four (4) years from the date the cause of action accrued. Tex. Civ. Prac. & Rem. Code section 16.004. The cause of action accrued when the foreclosure occurred on November 7, 2007. Appellees received their quitclaim deed from the Internal Revenue Service on September 19, 2017. This deed transferred the interest of JAB Development Corporation, if any to Appellees. The claim that the foreclosure was fraudulent was filed for the first time on February 8, 2021. (Supp.CR-252) The four-year statute of limitations was raised in Appellant's Response to Motion for Summary Judgment on Claims Against Hamilton and Bishop and in Appellant's Supplemental Answer. (CR-328) The Original Answer and Counterclaim filed March 15, 2021 also raised the issue of limitations as well as other defenses that were never addressed in the Motion for Summary Judgment. (Supp. CR-342)

In spite of the many pleadings filed after the Motion for Summary Judgment was filed on February 8, 2021, (CR-216) the Associate Judge considered the Motion for Summary Judgment on February 4, 2022 and granted the Motion at least in part on the same date. (CR-367) The stated basis for granting the Motion for Summary Judgment was that "there is no genuine issue of material fact as to Defendant's counterclaim to remove cloud from the title of the property". (CR-367) Apparently, the summary judgment was granted on the basis of the Appellees claim for declaratory judgment. (CR-368)

The Associate Judge then determined that title to the real property was "in Robert G. Pate and Judy K. Pate". (CR-369) There was no summary judgment evidence to support the finding that the Appellees owned title to the property in question through their quitclaim deed. A quitclaim deed does not convey title, it conveys only what the Internal Revenue Service owned. *Rogers v. Ricine Enters.,* 884 S.W. 2d 763, 769 (Tex. 1994); *Jackson v. Wildflower Prod. Co.*, 505 S.W. 3d 80,89 (Tex. App.-Amarillo 2016, pet. denied) There was no summary judgment

evidence that the Internal Revenue Service ever owned an interest in the real property in question.

The case should be reversed and remanded because the Appellees have failed to show their right to summary judgment.

IV. POINT FOUR

THE ASSOCIATE JUDGE ERRED IN GRANTING SUMMARY JUDGMENT BASED ON THE DECLARATORY JUDGMENT ACT CLAIM. A REVIEW OF THE SUMMARY JUDGMENT GRANTED BY THE ASSOCIATE JUDGE SHOWS THAT THE SUMMARY JUDGMENT WAS GRANTED BASED ON THE DECLARATORY JUDGMENT ACT. THE SUPREME COURT HAS HELD THAT THE DECLARATORY JUDGMENT ACT CANNOT BE USED TO DETERMINE TITLE TO REAL PROPERTY

Martin v. Amerman, 133 S.W. 3d 262, 265 (Tex. 2004) Actions under Tex. Prop. Code Ann. Section 22.001 (West 2014) are the exclusive method in Texas for adjudicating disputed claims of title to real property. *Texas Parks & Wildlife Dept. v. Sawyer Tr.,* 354 S.W. 3d 384, 389 (Tex. 2011)

Actions under section 22.001 "involve detailed pleading and proof requirements". *Lance v. Robinson*, 543 S.W. 3d 723, 735 (Tex. 2018) The Appellees did not have the pleadings required for a trespass to try title action. If the Appellees fail to establish their title under section 22.001 title would vest in the Appellant. *Hejl v. Wirth*, 343 S.W. 2d 226 (Tex. 1961)

The Appellees contend that their title emanated from a common source in their Motion for Summary Judgment. (CR-2160 This claim is not made in their trial pleading. (Supp. CR-252) Their trial pleading seeks declaratory judgment that the Substitute Trustee's Deed is invalid. (Supp.CR-255) They also seek damages for statutory and common law fraud. (Supp. CR-257)

Finally, the Appellees seek declaratory relief that the Substitute Trustee's Deed is "null and has no effect on the title" of Appellees. (Supp. CR-259)

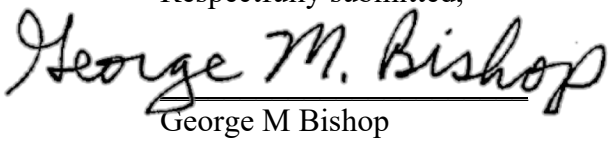
Appellees make no attempt in their trial pleadings to meet the requirements of section 22.001. The judgment of the trial court should be reversed and rendered for Appellant because they failed to prove their claim of title. *French v. Olive*, 67 Tex. 400, 3 S.W. 568 (1887); *Permian Oil Co. v. Smith*, 129 Tex. 413, 73 S.W. 2d 490 (1934); *Hejl v. Wir*th, 161 Tex. 609, 343 S.W. 2d 226 (1961)

The pleadings of the Appellees sought to establish title to the 4.7695 acres through a quitclaim deed and failed to meet the requirements of Tex. Prop Code section 22.001. Rule 301 of the Texas Rules of Civil Procedure requires that the judgment conform to the pleadings. The pleadings of the Appellees sought recovery for declaratory judgment which could not determine title to real property. *Martin v. Amerman*, 133 S.W. 3d 262, 267 (Tex. 2004)

PRAYER

Judgment should be rendered that the Appellees take nothing by their counterclaim.

Respectfully submitted,



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Certificate of Service

On April 10, 2023, this document was served electronically on Alicia Matsushima counsel for Appellees, via email at alicia@invictalawfirm.com.

/s/ George M. Bishop
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/s/ George M. Bishop
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Tex. Prop. Code § 22.001

Section 22.001 - Trespass to Try Title

(a) A trespass to try title action is the method of determining title to lands, tenements, or other real property.

(b) The action of ejectment is not available in this state.

Tex. Prop. Code § 22.001

Acts 1983, 68th Leg., p. 3509, ch. 576, Sec. 1, eff. 1/1/1984.

Tex. Civ. Prac. & Rem. Code § 16.004

Section 16.004 - Four-Year Limitations Period

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

(1) specific performance of a contract for the conveyance of real property;

(2) penalty or damages on the penal clause of a bond to convey real property;

(3) debt;

(4) fraud; or

(5) breach of fiduciary duty.

(b) A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian.

(c) A person must bring suit against his partner for a settlement of partnership accounts, and must bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than four years after the day that the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day that the dealings in which the parties were interested together cease.

Tex. Civ. Prac. and Rem. Code § 16.004

Amended by Acts 1999, 76th Leg., ch. 950, Sec. 1, eff. 8/30/1999.
Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. 9/1/1985.

Tex. Civ. Prac. & Rem. Code § 12.003

Section 12.003 - Cause of Action

(a) The following persons may bring an action to enjoin violation of this chapter or to recover damages under this chapter:

(1) the attorney general;

(2) a district attorney;

(3) a criminal district attorney;

(4) a county attorney with felony responsibilities;

(5) a county attorney;

(6) a municipal attorney;

(7) in the case of a fraudulent judgment lien, the person against whom the judgment is rendered; and

(8) in the case of a fraudulent lien or claim against real or personal property or an interest in real or personal property, the obligor or debtor, or a person who owns an interest in the real or personal property.

(b) Notwithstanding any other law, a person or a person licensed or regulated by Title 11, Insurance Code (the Texas Title Insurance Act), does not have a duty to disclose a fraudulent, as described by Section 51.901(c), Government Code, court record, document, or instrument purporting to create a lien or purporting to assert a claim on real property or an interest in real property in connection with a sale, conveyance, mortgage, or other transfer of the real property or interest in real property.

(c) Notwithstanding any other law, a purported judgment lien or document establishing or purporting to establish a judgment lien against property in this state, that is issued or purportedly issued by a court or a purported court other than a court established under the laws of this state or the United States, is void and has no effect in the determination of any title or right to the property.

Tex. Civ. Prac. and Rem. Code § 12.003

Amended by Acts 2005, 79th Leg., Ch. 728, Sec. 11.104, eff. 9/1/2005.
Added by Acts 1997, 75th Leg., ch. 189, Sec. 16, eff. 5/21/1997. Renumbered from Civil Practice & Remedies Code Sec. 11.003 by Acts 1999, 76th Leg., ch. 62, Sec. 19.01(3), eff. 9/1/1999.

Tex. R. Civ. P. 166a

Rule 166a - Summary Judgment

(a)For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b)For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c)Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d)Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(e)Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material

fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f)Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g)When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h)Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i)No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Tex. R. Civ. P. 166a

Tex. Gov't Code § 54A.112

Section 54A.112 - Notice of Right to De Novo Hearing; Waiver

(a) Notice of the right to a de novo hearing before the referring court shall be given to all parties.

(b) The notice may be given:

(1) by oral statement in open court;

(2) by posting inside or outside the courtroom of the referring court; or

(3) as otherwise directed by the referring court.

(c) Before the start of a hearing by an associate judge, a party may waive the right of a de novo hearing before the referring court in writing or on the record.

Tex. Gov't. Code § 54A.112

Added by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 6.01, eff. 1/1/2012.

Tex. Gov't Code § 54A.115

Section 54A.115 - De Novo Hearing

(a) A party may request a de novo hearing before the referring court by filing with the clerk of the referring court a written request not later than the seventh working day after the date the party receives notice of the substance of the associate judge's decision as provided by Section 54A.111.
(b) A request for a de novo hearing under this section must specify the issues that will be presented to the referring court. The de novo hearing is limited to the specified issues.
(c) Notice of a request for a de novo hearing before the referring court shall be given to the opposing attorney in the manner provided by Rule 21a, Texas Rules of Civil Procedure.
(d) If a request for a de novo hearing before the referring court is filed by a party, any other party may file a request for a de novo hearing before the referring court not later than the seventh working day after the date the initial request was filed.
(e) The referring court, after notice to the parties, shall hold a de novo hearing not later than the 30th day after the date the initial request for a de novo hearing was filed with the clerk of the referring court.
(f) In the de novo hearing before the referring court, the parties may present witnesses on the issues specified in the request for hearing. The referring court may also consider the record from the hearing before the associate judge, including the charge to and verdict returned by a jury, if the record was taken by a court reporter.
(g) The denial of relief to a party after a de novo hearing under this section or a party's waiver of the right to a de novo hearing before the referring court does not affect the right of a party to file a motion for new trial, a motion for judgment notwithstanding the verdict, or other posttrial motions.
(h) A party may not demand a second jury in a de novo hearing before the referring court if the associate judge's proposed order or judgment resulted from a jury trial.

Tex. Gov't. Code § 54A.115

Added by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 6.01, eff. 1/1/2012.

Tex. Gov't Code § 54A.111

Section 54A.111 - Notice of Decision; Appeal

(a) After hearing a matter, an associate judge shall notify each attorney participating in the hearing of the associate judge's decision. An associate judge's decision has the same force and effect as an order of the referring court unless a party appeals the decision as provided by Subsection (b).
(b) To appeal an associate judge's decision, other than the issuance of a temporary restraining order or temporary injunction, a party must file an appeal in the referring court not later than the seventh day after the date the party receives notice of the decision under Subsection (a).
(c) A temporary restraining order issued by an associate judge is effective immediately and expires on the 15th day after the date of issuance unless, after a hearing, the order is modified or extended by the associate judge or referring judge.
(d) A temporary injunction issued by an associate judge is effective immediately and continues during the pendency of a trial unless, after a hearing, the order is modified by a referring judge.
(e) A matter appealed to the referring court shall be tried de novo and is limited to only those matters specified in the appeal. Except on leave of court, a party may not submit on appeal any additional evidence or pleadings.

Tex. Gov't. Code § 54A.111

Added by Acts 2011, 82nd Leg., 1st C.S., Ch. 3, Sec. 6.01, eff. 1/1/2012.

No. 05-07-01451-CV
Court of Appeals of Texas, Fifth District, Dallas

Aland v. Martin

271 S.W.3d 424 (Tex. App. 2008)
Decided Nov 25, 2008

No. 05-07-01451-CV.

November 25, 2008.

Appeal from the 303rd Judicial District Court, 425 Dallas County, Dennise Garcia, J. *425

426 Julia F. Pendery, Dallas, for Appellant. *426

Aglaia D. Mauzy, Dixie Mauzy, D. Bradley Dickinson, Dickinson Associates, P.C., Dallas, for Appellee.

Before Justices BRIDGES, FITZGERALD, and LANG.

OPINION

Opinion by Justice LANG.

Following a bench trial, Linda S. Aland appeals the trial court's judgment in favor of appellee Justin A. Martin in a suit where Martin claimed Aland violated section 12.002 of the Texas Civil Practice and Remedies Code. See TEX. CIV. PRAC. REM. CODE ANN. § 12.002 (Vernon Supp. 2008). That statute provides for recovery of damages against persons who knowingly file fraudulent liens with intent to injure. *Id.* The trial court awarded Martin $10,000; trial attorney's fees of $13,683.84; conditional appellate attorney's fees of $10,000; and costs of court. Martin is the ex-husband of a client of Aland.

Aland asserts two issues on appeal: (1) the deed of trust signed by Aland's client to secure the payment of a promissory note for a debt the client owed Aland does not fit the statutory definition of "fraudulent lien," and (2) the evidence was legally and factually insufficient to support the statutory elements of liability under section 12.002.

We conclude the evidence is legally insufficient to support a finding that Aland intended to cause Martin physical injury, financial injury, or mental anguish or emotional distress as required under section 12.002. Therefore, we decide in favor of Aland on her second issue. Aland's first issue need not be addressed. We reverse the trial court's judgment and render judgment that Martin take nothing against Aland.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of an underlying divorce action between Martin and his now ex-wife, Diana Martin. Aland acted as counsel for Diana Martin in that action. During the divorce proceeding, Aland filed inventories on behalf of Diana Martin in which property located at 905 Ashwood Drive in Garland, Texas (the "Ashwood property") was designated as community property.

Aland agreed to take a promissory note in the amount of $10,315.64 from Diana Martin for legal fees pertaining to the divorce. To secure that promissory note, Diana Martin signed a deed of trust granting a lien on the Ashwood property and the deed of trust was filed in the deed records of Dallas County. The parties do not dispute that Diana Martin did not consult Martin prior to execution of the note and deed of trust.

In the ensuing July 25, 2006 Final Decree of Divorce, under the heading, "Property to Husband," Martin was awarded the Ashwood property, "including any obligations due thereon, excluding any lien in favor of Wife's attorney." Under that same heading, the divorce decree stated in part, "IT IS ORDERED that DIANA GALE MARTIN extinguish any debt owed to her attorney, LINDA S. ALAND, underlying the Deed of Trust on [the Ashwood property]." (emphasis original).[1] In another section of the divorce decree, under the heading, "Debts to Wife," Diana Martin was ordered, in part, to pay the "[d]ebt owed to
427 Linda S. Aland underlying *427 the Deed[] of Trust and Promissory Note[] executed by Diana Gale Martin against [the Ashwood property]."

[1] However, reference to a five-day time requirement for Diana Martin's payment of Aland was manually deleted and the deletion was initialed by counsel for both Martin and Diana Martin.

The parties do not dispute that Aland did not release the lien on the Ashwood property until she was paid by Diana Martin. The record shows Aland executed four separate releases regarding the deed of trust lien on the Ashwood property. The releases were all dated January 26, 2007.

Martin testified at trial that on August 1, 2006, he sought to "refinance" the Ashwood property. According to Martin, his efforts were unsuccessful due to the deed of trust lien. Martin filed this suit against Aland in late 2006. In his May 10, 2007 second amended petition, Martin sought damages pursuant to section 12.002.

At trial, the parties and their attorneys were the sole witnesses. Among the exhibits admitted into evidence at trial were (1) the Martins' July 25, 2006 Final Decree of Divorce; (2) a June 22, 2006 letter to Aland from Martin's counsel that read, in part, "Are you amenable to signing a *Release of Lien* with regard to the Ashwood property?" (emphasis original); (3) a September 18, 2006 letter to Aland from Martin's counsel stating, in part, "This is my client's demand that you release your lien against his home at 905 Ashwood Dr., Garland, Texas 75041."; (4) a September 22, 2006 "Memorandum" from Aland to Land America, a title company involved in processing Martin's loan application, on the subject of "Martin Pay Off," stating

> Please note that the payoff on the lien on the Ashwood property that you contacted me about is $10,718.54 through September 25, 2006 and interest continues to accrue on such amount at the rate of $1.70 per day thereafter.
>
> I will sign a release of both the lien and the lis pendens for the payment of the payoff balance.
>
> Call with any questions.;

and (5) Martin's response to Aland's request for admission number twenty-one. That request asserted Martin has "no evidence that Linda S. Aland acted with the intent to injure Justin Martin when Diana Martin executed a Deed of Trust on [the Ashwood property] in favor of Linda S. Aland."

Martin denied the request for admission and stated in response

> This was denied because the evidence is that my consent was not obtained to the signing of the Deed of Trust which clouded the title to my one-half of the community property. It injured me by creating a debt that I did not incur and which, in fact, the Court ordered my ex-wife to pay in the decree.

During cross-examination at trial, Martin was asked by Aland's counsel for "a list of any acts that you contend Linda Aland has done with intent to injure you in connection with acquiring a Deed of Trust on the Ashwood property during the pendency of the divorce." Martin testified, "I

contend that that was an invalid lien that she placed. . . . And I also content [sic] that her refusal to release that lien is in direct violation to [sic] the decree of this Court."

Aland testified at trial that at the time she took the deed of trust from Diana Martin, it was not her intent to cause Martin to suffer any financial injury. In addition, on cross-examination by Martin's counsel, Aland testified as follows:

> Q: Did you want Justin Martin to be able to dispose of the Ashwood property while you had a lien on it?
>
> . . . .
>
> A: I didn't think about that question.
>
> Q: Why did you file a lien with the County Clerk's office?

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> A: It was done at the time a promissory note was signed by my client to secure the note so that the legal fees she owed at the time back in February of 2006 would be paid.
>
> Q: Would be paid. And did you want the Ashwood property to be disposed of before you were paid?
>
> A: I never thought about whether I wanted or didn't want such an issue.

In closing argument, Aland's counsel asserted, in part, "There is no evidence of any intent of Ms. Aland to cause Mr. Martin, the Plaintiff, any injury whatsoever."

In its July 26, 2007 judgment, the trial court awarded Martin damages, attorney's fees, and court costs as stated above.[2] Aland filed a "Motion to Modify and, Alternatively, Motion for New Trial," which was overruled on October 4, 2007. This appeal followed.

2 The trial court's September 24, 2007 findings of fact and conclusions of law included, in relevant part, the following:

> 11. The Deed of Trust was taken on the Ashwood property without the knowledge or consent of Plaintiff, Justin A. Martin.
>
> 12. The Deed of Trust purported to place a lien on the entire property located at 905 Ashwood Drive, Garland, Texas.
>
> 13. Justin A. Martin owned a one-half (½) individual interest in [the Ashwood property].
>
> 14. The Deed of Trust was taken in fraud of Plaintiff's interest in the property.
>
> 15. The Deed of Trust was filed with the deed records of Dallas County, Texas, by Linda S. Aland without the knowledge or consent of Justin A. Martin.
>
> 16. Linda S. Aland is a Board Certified family lawyer and knew, or should have known, that a valid lien cannot be placed against community property without the consent in writing of both parties.
>
> 17. Linda S. Aland intended to create a cloud on the title of the Ashwood property by her filing of the Deed of Trust.
>
> . . . .

CONCLUSIONS OF LAW

1. Section 3.102 of the Texas Family Code provides that community property is subject to the joint management, control and disposition of the spouses unless provided otherwise in writing.

2. Section 12.002 of the Texas Civil Practice and Remedy [sic] Code provides that a person may not use a document if that person has knowledge that such document is a fraudulent claim against real property and intends that such document be given the same effect as a legitimate claim.

3. Further, Article 12.002 provides that a person who violates this provision is liable to each injured person in the greater of $10,000.00 or actual damage.

. . .

II. LIABILITY UNDER SECTION 12.002

We focus first on Aland's second issue where she asserts the evidence is legally insufficient to support a finding that she intended to cause physical, financial, or emotional injury to Martin. Aland contends Martin's testimony did not constitute evidence of her intent to injure him, and her own testimony negated such intent as a matter of law. In addition, Aland asserts Martin's "circumstantial evidence" of Aland's intent to injure him was neither probative nor relevant.

Martin contends Aland "relies solely upon her own subjective testimony and disregards the remainder of the evidence." Further, Martin asserts the plain language of section 12.002 applies not only to the filing of the lien, but also to "making, presenting, or using such a document." According to Martin, "Aland ignores the fact that, for a period of at least six months, she continued to use the lien as pseudo-extortion in an attempt to obtain monies from Mr. Martin." Martin argues there is "more than sufficient evidence to support the findings of the trier of fact."

A. Standard of Review

Findings of fact in a case tried to the court have
429 the same force and effect as *429 jury findings. *Pulley v. Milberger*, 198 S.W.3d 418, 426 (Tex.App.-Dallas 2006, pet. denied). An appellate court reviews a trial court's fact findings by the same standards it uses to review the sufficiency of the evidence to support a jury's findings. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Pulley*, 198 S.W.3d at 426; *see also In re S.K.A.*, 236 S.W.3d 875, 903 (Tex.App.-Texarkana 2007, no pet.) (trial court's presumed findings on omitted elements reviewed under same standards of legal and factual sufficiency as express findings) (citing *Lindner v. Hill*, 691 S.W.2d 590, 592 (Tex. 1985)). When challenged, a trial court's findings of fact are not conclusive if, as in the present case, there is a complete reporter's record. *Brockie v. Webb*, 244 S.W.3d 905, 908 (Tex.App.-Dallas 2008, pet. denied).

When an appellant attacks the legal sufficiency of an adverse finding on an issue for which he did not have the burden of proof, he must demonstrate there is no evidence to support the adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Pulley*, 198 S.W.3d at 426. In a legal sufficiency review, we view the evidence in a light most favorable to the finding, crediting favorable evidence if a reasonable fact-finder could and disregarding contrary evidence unless a reasonable fact-finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 822 (Tex. 2005); *Sanders v. Total Heat Air, Inc.*, 248 S.W.3d 907, 912 (Tex.App.-Dallas 2008, no pet.). In evaluating the legal sufficiency of the evidence to support a finding, we must determine whether the evidence

as a whole rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994); *Edwards v. Mid-Continent Office Distribs., L.P.*, 252 S.W.3d 833, 836 (Tex.App.-Dallas 2008, pet. denied); *Columbia Med. Ctr. Subsidiary, L.P. v. Meier*, 198 S.W.3d 408, 414 (Tex.App.-Dallas 2006, pet. denied) (citing *City of Keller*, 168 S.W.3d at 822). An appellate court will sustain a no-evidence point when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Marathon. Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003); *see also City of Keller*, 168 S.W.3d at 810. Evidence does not exceed a scintilla if it is "so weak as to do no more than create a mere surmise or suspicion" that the fact exists. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). Anything more than a scintilla of evidence is legally sufficient to support a challenged finding. *Walker v. Cotter Props., Inc.*, 181 S.W.3d 895, 899 (Tex.App.-Dallas 2006, no pet.).

Any ultimate fact may be proved by circumstantial evidence. *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993); *see also Hoffmann, v. Dandurand*, 143 S.W.3d 555, 559 (Tex.App.-Dallas 2004, no pet.) (ultimate fact is one that is essential to cause of action and would have direct effect on judgment). An ultimate fact is established by circumstantial evidence when the fact may be fairly and reasonably inferred from other facts proved in the case. *Russell*, 865 S.W.2d at 933. However, to withstand a legal sufficiency challenge, circumstantial evidence still must consist of more than a scintilla. *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995). As a general matter, the remedy when a legal sufficiency point is sustained is for the court of
430 appeals to *430 render judgment on that point. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 86 (Tex. 1992); *Armstrong v. Benavides*, 180 S.W.3d 359, 359 (Tex.App.-Dallas 2005, no pet.).

B. Applicable Law

Section 12.002(a) of the Texas Civil Practice and Remedies Code provides as follows:

> (a) A person may not make, present, or use a document or other record with:
>
> (1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;
>
> (2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and
>
> (3) intent to cause another person to suffer:
>
> (A) physical injury;
>
> (B) financial injury; or
>
> (C) mental anguish or emotional distress.

TEX. CIV. PRAC. REM. CODE ANN. § 12.002(a). The party asserting a claim under section 12.002 has the burden to prove the requisite elements of the statute. *See Preston Gate, L.P. v. Bukaty*, 248 S.W.3d 892, 896-97 (Tex.App.-Dallas 2008, no pet.).

Rule 299 of the Texas Rules of Civil Procedure provides in relevant part

> When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment.

TEX.R. CIV. P. 299; *see also Sanders*, 248 S.W.3d at 914 (reviewing evidence to support omitted element "impliedly found" by trial court pursuant to rule 299); *Burnside Air Conditioning Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 893 (Tex.App.-Dallas 2003, no pet.) (finding on omitted element presumed in accordance with rule 299).

C. Application of Law to Facts

The trial court expressly found that the deed of trust "was taken in fraud of Plaintiffs interest in the property" and that Aland "is a Board Certified family lawyer and knew, or should have known, that a valid lien cannot be placed against community property without the consent in writing of both parties." Thus, the trial court's express findings appear to address the first element a claimant under section 12.002 must prove, knowledge that the document or record at issue is a fraudulent court record or a fraudulent lien or claim. *See* TEX. CIV. PRAC. REM. CODE ANN. § 12.002(a)(1). Additionally, the trial court expressly found Aland "intended to create a cloud on the title of the Ashwood property by her filing of the Deed of Trust." That finding appears to address the second element required under section 12.002(a), intent that the document or record at issue be given the same legal effect *431 as a court record evidencing a valid lien or claim. *See id.* § 12.002(a)(2).

Now we address the findings and the third element of a claim under section 12.002, intent to cause injury under section 12.002(a)(3). *See id.* § 12.002(a)(3); *Preston Gate*, 248 S.W.3d at 897. However, the findings of the trial court do not include an express finding addressing an intent by Aland to cause injury to Martin as required under section 12.002(a)(3). *See* TEX. CIV. PRAC. REM. CODE ANN. § 12.002(a)(3). The record shows no request for a such a finding on that element. See TEX.R. CIV. P. 299. In this instance, we must review the record to determine if the evidence supports a "presumed finding" that Aland made, presented, or used the lien at issue with intent to cause Martin to suffer physical injury, financial injury, or mental anguish or emotional distress. *See id.; Burnside*, 113 S.W.3d at 893; TEX. CIV. PRAC. REM. CODE ANN. § 12.002(a)(3); *see also Monroe v. Alternatives in Motion*, 234 S.W.3d 56, 62 (Tex.App.-Houston [1st Dist.] 2007, no pet.) (interpreting issue on appeal as challenge to legal sufficiency of evidence to support presumed finding pursuant to rule 299).

According to Martin, there is substantial "evidence" that supports a finding of "intent."[3] However, as to the enumerated evidence, he asserts the proof of Aland's intent must be "inferred" from "common knowledge":

> [3] That purported evidence is as follows, quoted from Martin's brief before this Court:
>
> > Aland knowingly took a Deed of Trust and filed a lien on community property when such conduct was not permitted under the Family Code;
> >
> > Mr. Martin was not told about the lien and was never consulted nor agreed to the filing of the lien against the community property on Ashwood;

> Mr. Martin was awarded the Ashwood property excluding the lien as his separate property;
>
> Mr. Martin was awarded the real property located on Ashwood as his separate property in the divorce decree;
>
> Mr. Martin sought to refinance the Ashwood property but was unsuccessful because of the cloud on the title placed by Aland;
>
> Numerous requests were made upon Aland to remove the lien but she did not do so even though Mr. Martin did not owe her any money;
>
> Even though Mr. Martin did not owe her any money and the property was awarded to Mr. Martin as his separate property in the divorce, Aland alleged that she was owed $10,000 in communications to the title company and would not release the lien;
>
> Mr. Martin testified that Aland intended to harm him by filing the invalid lien and by refusing to release the lien;
>
> Aland did not remove the lien for an additional six months; and Until Aland finally released the lien, Mr. Martin "went without" and borrowed "whatever [he] could for necessities."
>
> (citations to record omitted).
>
> It is a matter of common knowledge (that the trier of fact was entitled to consider) that interfering with a person's real property rights and interfering with a person's ability to refinance will cause harm to that person. Nonetheless, Aland intentionally interfered with Mr. Martin's rights and did so knowing that there was no legal basis for her actions.

Martin argues "there was both direct and circumstantial evidence of knowledge" by Aland that "a valid lien could not be placed on community property without the consent in writing of both parties." Martin contends that evidence not only supports a finding as to the knowledge of fraud element of section 12.002(a)(1), but also constitutes evidence as to the intent element of section 12.002(a)(3). *See* TEX. CIV. PRAC. REM. CODE ANN. § 12.002(a)(1), (3). However, even assuming without deciding that, as argued by Martin, Aland had the requisite knowledge at the time *432 the lien was filed to satisfy section 12.002(a)(1), Martin cites no authority that such knowledge on the part of Aland would constitute more than a scintilla of evidence as to the intent to cause injury element of section 12.002(a)(3). *Cf. Taylor Elec. Servs., Inc. v. Armstrong Elec. Supply Co.*, 167 S.W.3d 522, 531-32 (Tex.App.-Fort Worth 2005, no pet.) (knowledge that lien was fraudulent not considered by appellate court as direct or circumstantial evidence in analysis of whether record contained factually sufficient evidence of intent to cause injury under section 12.002(a)(3)).

The July 25, 2006 divorce decree addressed the lien without comment as to its validity. Under the decree, Martin was awarded, in part, the Ashwood property, "including any obligations due thereon, excluding any lien in favor of Wife's attorney." The decree identified Diana Martin as being responsible for the "[d]ebt owed to Linda S. Aland underlying the Deed[] of Trust and Promissory Note[] executed by Diana Gale Martin against [the Ashwood property]." Further, the decree ordered

Diana Martin to "extinguish any debt owed to her attorney, LINDA S. ALAND, underlying the Deed of Trust on [the Ashwood property]." (emphasis original). As originally prepared, the decree included a five-day time limit for Diana Martin to extinguish the debt to Aland. However, that provision was marked out and initialed by the attorneys. The form of the decree signed by the court made no provision for removal of the lien by the parties and placed no such obligation on Aland. When contacted by Land America, Aland provided information regarding the payoff amount of the debt underlying the deed of trust. Aland removed the lien upon payment of the promissory note by Diana Martin.

Aland cites the *Preston Gate* case in support of her contentions as to legal insufficiency. *See Preston Gate*, 248 S.W.3d at 892. That case is helpful in our analysis. In Preston Gate, appellee Bukaty filed a lawsuit on behalf of appellee Network Multi-Family Security Corporation against "LTS Group, Inc. d/b/a Preston Gate LP, f/k/a Preston Partners, L.P." to recover on a debt owed for construction services. *Id.* at 895. The trial court ultimately rendered a default judgment against only LTS. *Id.* Bukaty served LTS with a writ of execution and filed an abstract of judgment against "LTS Group, Inc. dba Preston Gate, LP fka Preston Partners, LP." *Id.* As a result, property owned by Preston Gate was encumbered by the resulting judgment lien even though the judgment was solely against LTS. *Id.* Despite Preston Gate's request, appellees refused to remove the judgment lien from Preston Gate's property. *Id.* Only after the trial court granted LTS's bill of review and vacated the underlying default judgment did appellees file releases of the judgment lien. *Id.*

Preston Gate asserted claims against appellees for slander of title and filing a fraudulent lien under section 12.002. *Id.* The trial court granted summary judgment in favor of appellees. *Id.* Preston Gate appealed. *Id.* On appeal, in addressing Preston Gate's section 12.002 claim, this Court specifically disagreed with Preston Gate's assertion that appellees' intent to cause it financial injury by filing the abstract of judgment was "self-evident" based on appellees' failure to remove the lien as Preston Gate had demanded. *Id.* at 897. This Court stated

> [T]he evidence before the trial court established that the abstract of judgment was filed and based on the existing default judgment obtained by appellees. That judgment was based, in turn, on the contract that Preston Gate had executed with Network. Because the record *433 is devoid of any evidence that appellees intended to cause Preston Gate financial injury when it [sic] filed the abstract of judgment, the trial court properly granted summary judgment on this claim.

433

Id.

We reject Martin's proposition that Aland's failure to remove the lien at his request constitutes evidence of intent by Aland to cause him financial injury. *See id.* The portions of the record identified by Martin reveal nothing that constitutes more than a scintilla of evidence Aland intended to cause Martin to suffer "physical injury; financial injury; or mental anguish or emotional distress" as required under section 12.002(a). See TEX. CIV. PRAC. REM. CODE ANN. § 12.002(a); *City of Keller*, 168 S.W.3d at 810.

We are guided by the pronouncement of the Texas Supreme Court that "[w]hen the circumstances are equally consistent with either of two facts, neither fact may be inferred." *City of Keller*, 168 S.W.3d at 813. Based on review of the entire record, including the terms of the divorce decree and the initialed change to the original wording of that decree, we cannot conclude the evidence is any more consistent with an intent on the part of Aland to cause the requisite injury to Martin than with a lack of intent to cause such injury. *See id.; Ford Motor Co.*, 135 S.W.3d at 601 ("To raise a genuine issue of material fact, however, the evidence must transcend mere suspicion. Evidence that is so

slight as to make any inference a guess is in legal effect no evidence."); *see also Blount*, 910 S.W.2d at 933 (fact-finder may not infer ultimate fact from "meager circumstantial evidence" that could give rise to any number of inferences, none more probable than another).

After viewing all the evidence in a light most favorable to the finding at issue, crediting favorable evidence if a reasonable fact-finder could and disregarding contrary evidence unless a reasonable fact-finder could not, we conclude there is no more than a scintilla of evidence in the record to support a presumed finding that Aland made, presented, or used the lien at issue with intent to cause Martin to suffer physical injury, financial injury, or mental anguish or emotional distress. *See* TEX. CIV. PRAC. REM. CODE ANN. § 12.002(a)(3); *City of Keller*, 168 S.W.3d at 807, 827. Evidence that amounts to no more than a scintilla is, in legal effect, no evidence. *See Kindred*, 650 S.W.2d at 63; *see also City of Keller*, 168 S.W.3d at 810, 822. We conclude this record contains no evidence as to the intent element of section 12.002(a)(3). *See* TEX. CIV. PRAC. REM. CODE ANN. § 12.002(a)(3). Aland's second issue is decided in her favor.

III. CONCLUSION

Because the evidence is not legally sufficient to support a finding of intent by Aland to cause Martin to suffer the requisite injury under section 12.002, we decide in favor of Aland on her second issue. Aland's first issue need not be addressed. We reverse the trial court's judgment in favor of Martin and render judgment that Martin take nothing against Aland.

434 *434

No. 01-11-00328-CV
Court of Appeals of Texas, Houston (1st Dist.).

Ardmore, Inc. v. Rex Grp., Inc.

377 S.W.3d 45 (Tex. App. 2012)
Decided Apr 19, 2012

No. 01–11–00328–CV.

2012-04-19

ARDMORE, INC. f/k/a GHX Incorporated and Star Properties, LLC, Appellants v. The REX GROUP, INC. d/b/a T–3 Support Services, Inc., Appellee.

Ben A. Baring Jr., Paul J. McConnell, De Lange, Hudspeth, McConnell & Tibbets,L.L.P., Robert A. Jones, Craig W. Saunders, Barlow Jones L.L.P., Richard H. Edelman, Houston, TX, for Appellants. Katherine T. Garber, James M. Kimbell, Strasburger & Price, L.L.P., Thomas W. Paterson, Susman Godfrey, LLP, Houston, TX, for Appellee.

LAURA CARTER HIGLEY

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Ben A. Baring Jr., Paul J. McConnell, De Lange,
49 Hudspeth, McConnell & Tibbets,*49 L.L.P., Robert A. Jones, Craig W. Saunders, Barlow Jones L.L.P., Richard H. Edelman, Houston, TX, for Appellants. Katherine T. Garber, James M. Kimbell, Strasburger & Price, L.L.P., Thomas W. Paterson, Susman Godfrey, LLP, Houston, TX, for Appellee.

Panel consists of Chief Justice RADACK and Justices HIGLEY and BROWN.

OPINION

LAURA CARTER HIGLEY, Justice.

This appeal concerns whether purchase options in two leases were properly exercised. Appellants, Ardmore, Inc. and Star Properties, LLC, appeal the trial court's grants of summary judgment against them and in favor of appellee, The Rex Group, Inc. In one issue, Star Properties argues that the trial court erred by determining that The Rex Group had timely exercised its option to purchase from Star Properties. In two issues, Ardmore argues that the trial court erred by determining the statute of frauds barred the application of its option to purchase from The Rex Group because (1) the property was identified with reasonable certainty; (2) Ardmore fully performed under the contract; (3) Ardmore partially performed under the contract; and (4) The Rex Group is estopped from asserting the statute of frauds defense. In a cross-appeal, The Rex Group challenges the sufficiency of the evidence to support the trial court's award of attorneys' fees in favor of The Rex Group and against Star Properties.

We affirm, in part, and reverse and remand, in part.

Background

This lawsuit concerned a dispute over ownership of certain commercial property located in Houston, Texas. There are three parties involved in the suit: Star Properties, the owner of the property; The Rex Group, the lessee of the property; and Ardmore, a sublessee of the property. Both the lease from Star Properties to The Rex Group and the sublease from The Rex Group to Ardmore contain purchase options,

exercisable at the end of the lease from Star Properties to The Rex Group. At the end of the lease, The Rex Group attempted to exercise the purchase option in the lease, and Ardmore attempted to exercise the purchase option in the sublease. In turn, Star Properties asserted that The Rex Group's attempt was ineffective, and The Rex Group asserted that Ardmore's attempt was ineffective. The parties brought this litigation seeking to establish their respective claims to ownership of the property.

The commercial property at issue in this case is located along Ardmore Street in Houston, Texas. In 1991, the property in question was owned by Baker Hughes, Inc. and Combustion Engineering, Inc. Combustion Engineering later conveyed its interest in the property to ABB Prospects, Inc. Baker Hughes, Combustion Engineering, and ABB Prospects will be referred to collectively as the "Original Lessors." The Original Lessors entered into a lease agreement with The Rex Group, Inc. in May 1991. The lease was effective until the end of November 1997. During the term of the lease—provided that proper notice was given—The Rex Group was authorized to purchase the property in question for $2,500,000.

The lease also prevented The Rex Group from assigning or subleasing any portion of the property to non-affiliated parties without obtaining the prior written consent of the landlord. Specifically, the
50 lease provided, in pertinent part,*50

> Except for subleases to affiliates or subsidiaries of Tenant [The Rex Group] for which no consent to sublease shall be required by Landlord [the Original Lessors], Tenant may not sublet all or any portion of the Premises without the prior written consent of Landlord. Landlord shall not unreasonably withhold its required consent to a particular subletting provided [certain enumerated conditions exist]. Tenant shall not be relieved of any of its obligations hereunder by reason of any sublease of all or part of the premises.

The lease was amended by agreement of the parties at least seven times. Among other things, the amendments extended the term of the lease to July 2008, and modified the terms of the purchase option. As modified by the sixth amendment, the purchase option section of the lease provided, in pertinent part,

> A. In consideration of the mutual covenants herein contained, Landlord grants to Tenant the option to purchase the Premises during the Term for $2,500,000 in accordance with this Section. This option to purchase may not be exercised to be effective at any time or times other than in the month of June, 2008 (the "Effective Month").
>
> ....
>
> D. Except as provided in subsection F. below, to exercise such purchase option, Tenant must ... (ii) give Landlord written notice of its intent to purchase at least 90 days prior to the first day of the applicable Effective Month....

The parties agree that, by the terms of these two subsections alone, The Rex Group's deadline to exercise the purchase option was March 3, 2008.

As of 2001, both The Rex Group and Ardmore were subsidiaries of Industrial Holdings Incorporated, and both were operating their businesses in the commercial property subject to the lease. In 2001, Industrial Holdings began negotiations over a merger with T3 Energy Services. One condition of the merger was that Industrial Holdings would sell Ardmore prior to the merger.

As a result, Industrial Holdings approached Ben Andrews and Dan Ahuero, the executives then in charge of Ardmore, about purchasing Ardmore. Andrews and Ahuero agreed but insisted as part of the sale that they be allowed to remain on the leased premises and, if The Rex Group elected to exercise the purchase option in the lease, that they be allowed to purchase a lesser portion of the property.

To that end, The Rex Group entered into a sublease with Ardmore. The sublease provided that it was "subject and subordinate to" the lease. It also recognized that Ardmore was already subleasing a portion of the property. That portion of the property was defined as the "Premises" in the sublease "as more particularly described on *Exhibit A*." Exhibit A consists of the following image:

Image 1 (6.94" X 5.49") Available for Offline Print

51 *51

The sublease gave Ardmore continued use of the Premises along with "the nonexclusive right to use for vehicular and pedestrian access and vehicular parking, any and all driveways, parking areas, pedestrian walkways, and other common or shared areas, including, without limitation, the "Shared Drive" depicted on *Exhibit A*."

The purchase option in the sublease provided, in pertinent part:

In the event that Sublessor [The Rex Group] elects to exercise the option to purchase the premises covered by the Base Lease (the "Entire Base Lease Premises") in accordance with the terms of such purchase option contained in Section 27 of the Base Lease (the "Purchase Option"), Sublessor shall give Lessors the required written notice of Sublessor's intent to exercise the Purchase Option (the "Exercise Notice") no later than the thirtieth (30th) day ("Sublessor Exercise Deadline") prior to the last day by which the Purchase Option may be timely exercised pursuant to Section 27.D(ii) of the Base Lease.... Sublessee [Ardmore] shall thereupon be entitled, contemporaneously with Sublessor's acquisition of the Entire Base Lease Premises, to acquire from Sublessor that portion of the Entire Base Lease Premises ("Option Property") as is depicted on the drawing attached hereto as *Exhibit D* ....

The parties agree that the Ardmore's exercise deadline, as defined in the sublease, was February 2, 2008.

Exhibit D consists of the following image:

Image 2 (6.94" X 4.65") Available for Offline Print

52 *52

Both exhibits were prepared by Andrews on behalf of Ardmore. Andrews testified in his deposition that both exhibits were drafted from the same basic drawing. Andrews acknowledged that there were already markings on the basic drawing he used to create the exhibits. Exhibit A defines the premises to be leased, and Exhibit D defines the premises subject to the purchase option. To that end, Andrews testified, Exhibit A contains a line that "more heavily note [s]" the subleased area. The markings added to Exhibit D show what would be subject to the purchase option.

The Original Lessors consented in writing to the sublease on December 13, 2001. In it, the Original Lessors acknowledged that consent was given and provided that the "Sublease shall not diminish or in any way effect the obligations of Lessee [The Rex Group] to Lessor [the Original Lessors] under the Lease and Lessee shall remain primarily liable for the performance of its obligations under the Lease notwithstanding the existence of the Sublease." The consent also provided that "Lessee and Sublessee [Ardmore] acknowledge and agree that Lessor has executed this Consent solely to evidence its consent to the Sublease and this Consent shall not in any way create any liabilities, obligations or duties on the part of Lessor." It was signed by representatives for the Original Lessors, The Rex Group, and Ardmore.

In 2003, the Original Lessors sold the property and its lease to Star Properties.

On February 7, 2008, The Rex Group sent Star Properties a written notification of its intent to exercise its purchase option under the lease. On February 15, 2008, Star Properties sent The Rex Group a letter, asserting that The Rex Group had failed to timely exercise its purchase option in accordance with the lease as modified by the sublease.

Following The Rex Group's notification of its intent to exercise the purchase option under the lease, Ardmore elected to exercise its purchase option under the sublease. The Rex Group asserted
53 that Ardmore*53 could not enforce the purchase option on the grounds that the description of the property subject to the sublease's purchase option violated the statute of frauds.

The underlying litigation ensued. The Rex Group brought claims against Star Properties and Ardmore. Star Properties and Ardmore each brought counterclaims against The Rex Group. As those claims pertain to this appeal, each of the parties sought an adjudication of which, if any, of the purchase options were properly exercised. All of the parties ultimately brought motions for summary judgment on the issues.

As a part of its summary judgment evidence, Ardmore presented the affidavit of Ernest Roth, a registered professional land surveyor. Roth testified in his affidavit that he was familiar with the locality of the property subject to the sublease's purchase option, that he "was able to identify and determine the boundaries of the Option Property with reference to the description thereof provided in the sublease and Exhibit D thereto," and that the property could be identified with reasonable certainty. He included with his affidavit a metes-and-bounds description of the property subject to the sublease's purchase option based on the property description.

In a series of rulings on the motions, the trial court determined that The Rex Group had timely exercised its purchase option under the lease and that the description of the property subject to the purchase option in the sublease was rendered unenforceable by the statute of frauds.

The parties submitted the issue of attorneys' fees to a bench trial. The trial court ultimately awarded attorneys' fees in favor of The Rex Group and against Ardmore and Star Properties.

Each of the parties appealed.

Motions for Summary Judgment

In one issue, Star Properties argues that the trial court erred by determining that The Rex Group had timely exercised its option to purchase from Star Properties. In two issues, Ardmore argues that the trial court erred by determining the statute of frauds barred the application of its option to purchase from The Rex Group because (1) the property was identified with reasonable certainty; (2) Ardmore fully performed under the contract; (3) Ardmore partially performed under the contract; and (4) The Rex Group is estopped from asserting the statute of frauds defense.

A. Standard of Review

The summary-judgment movant must conclusively establish its right to judgment as a matter of law. *See MMP, Ltd. v. Jones,* 710 S.W.2d 59, 60 (Tex.1986). Because summary judgment is a question of law, we review a trial court's summary judgment decision de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding,* 289 S.W.3d 844, 848 (Tex.2009).

To prevail on a "traditional" summary-judgment motion asserted under Rule 166a(c), a movant must prove that there is no genuine issue regarding any material fact and that it is entitled to judgment as a matter of law. *See*Tex.R. Civ. P. 166a(c); *Little v. Tex. Dep't of Criminal Justice,* 148 S.W.3d 374, 381 (Tex.2004). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson,* 168 S.W.3d 802, 816 (Tex.2005).

When a party moves for summary judgment on a claim for which it bears the burden of proof, it must show that it is entitled to prevail on each
54 element of its cause of action. *See* *54 *Parker v. Dodge,* 98 S.W.3d 297, 299 (Tex.App.-Houston [1st Dist.] 2003, no pet.). The party meets this burden if it produces evidence that would be sufficient to support an instructed verdict at trial. *Id.*

To determine if there is a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding,* 289 S.W.3d at 848 (citing *City of Keller,* 168 S.W.3d at 827). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Sw. Elec. Power Co. v. Grant,* 73 S.W.3d 211, 215 (Tex.2002).

When, as here, the parties file cross-motions for summary judgment on overlapping issues, and the trial court grants one motion and denies the other, we review the summary judgment evidence supporting both motions and "render the judgment that the trial court should have rendered." *FM Props. Operating Co. v. City of Austin,* 22 S.W.3d 868, 872 (Tex.2000).

B. Timeliness of the Notice under the Lease

Star Properties acknowledges that, under the terms of the lease alone, The Rex Group's deadline to exercise the purchase option was March 3, 2008. It also acknowledges that The Rex Group sent its written notice of its intent to exercise its purchase option under the lease on February 7, 2008. Star Properties maintains that The Rex Group nevertheless failed to timely exercise the purchase option under the lease because the purchase option under the lease was modified by the purchase option under the sublease to Ardmore.

The Rex Group acknowledges that, under the terms of the sublease purchase option, it had agreed with Ardmore that The Rex Group would submit its notice of its intent to exercise the purchase option by February 2, 2008. The Rex Group maintains, however, that Star Properties was not a party to the sublease and, accordingly, cannot use the notice deadline under the sublease as a basis to claim that The Rex Group's notice was untimely.

The trial court determined that the deadline to exercise the purchase option under the lease was March 3, 2008 and that The Rex Group timely exercised its right to purchase the property.

In making its argument, Star Properties relies on the following facts: The lease required consent of the landlord for subleases with entities that were not affiliates or subsidiaries of The Rex Group. Star Properties signed a written consent in the form of a contract, which incorporated the sublease into the consent. The sublease incorporated the lease into the sublease. The consent was expressly conditioned on the specific terms of the sublease, including, Star Properties argues, the February 2 exercise date for the option.

Based on these facts, Star Properties argues, "Because the consent was a formal contract that expressly incorporated the sublease (which, in turn, expressly incorporated the lease) and was signed by all three ... parties to the lease and sublease, the signing of the consent was tantamount to all three parties also signing the lease and sublease so as to each be mutually bound by the terms of the three agreements that applied to them."

Specific terms from the lease, the sublease, and the consent show that this argument is incorrect. The lease provides that any sublease entered into by The Rex Group will not relieve it "of any of its obligations hereunder by reason of any sublease of all or part of the Premises." The sublease provides that it is "subject and subordinate to" the lease.
55 The consent*55 provides that the sublease "shall

not diminish or in any way effect the obligations of [The Rex Group] to [then Original Lessors, now Star Properties] under the Lease" and that the Original Lessors "executed this Consent solely to evidence [their] consent to the Sublease." The plain language of each of these contracts establishes that Star Properties was not a party to the sublease and that the sublease did not modify the lease.

Star Properties argues that the provision in the consent stating that the sublease does not diminish or effect the obligations of The Rex Group should not affect our analysis because the purchase option is a right, not an obligation. The Rex Group counters that, while the purchase option may generally be a right, the notice requirement and deadline are obligations. We agree with The Rex Group. Generally, an option in a contract "is a privilege or right." *Faucette v. Chantos,* 322 S.W.3d 901, 907 (Tex.App.-Houston [14th Dist.] 2010, no pet.). But that right can only be exercised by strictly complying with the obligations set out in the contract. *See id.* at 908;*Mensa–Wilmot v. Smith Int'l, Inc.,* 312 S.W.3d 771, 781 (Tex.App.-Houston [1st Dist.] 2009, no pet.). The consent explicitly provides that the sublease would not "in any way effect" The Rex Group's obligations in the lease. No exception is made for the obligations required to exercise the purchase option.

Star Properties also argues that allowing the lease and sublease to have separate exercise dates for the purchase option in the lease leads to the conclusion that The Rex Group intended to allow for the breach of the sublease. It further argues that such a conclusion would violate the rules of contract construction because this would mean the sublease was fraudulently induced and, accordingly, invalid. *See Tawes v. Barnes,* 340 S.W.3d 419, 425 (Tex.2011) (holding all provisions of a contract must be given effect so that none is rendered meaningless).

Whether the sublease was fraudulently induced, is unenforceable, or allows for an easy breach by The Rex Group is irrelevant to our analysis. "The general rule is that only the parties to a contract have the right to complain of a breach thereof; and if they are satisfied with the disposition that has been made of it and all claims under it, a third person has no right to insist that it has been broken." *Wells v. Dotson,* 261 S.W.3d 275, 284 (Tex.App.-Tyler 2008, no pet.); *see also Allan v. Nersesova,* 307 S.W.3d 564, 571 (Tex.App.-Dallas 2010, no pet.) (holding party must be in privity of contract or beneficiary of contract to have standing to complain about contract). Neither The Rex Group nor Ardmore has asserted that the modified notification date in the sublease was fraudulently induced, rendered the contract unenforceable, or has resulted in a material breach of the contract. Star Properties may not assert this argument on their behalf. *See Wells,* 261 S.W.3d at 284.

We hold that the evidence establishes, as a matter of law, that The Rex Group timely exercised its purchase option under the lease. We overrule Star Properties' sole issue.

C. Application of the Statute of Frauds to the Purchase Option in the Sublease

In its first issue, Ardmore argues the trial court erred by granting The Rex Group's motion for summary judgment. Both parties' motions for summary judgment focus on whether the statute of frauds bars the application of the purchase option in the sublease and, if it does, *56 whether any of the exceptions to the application of the statute of frauds also apply.

56

Under the applicable statute of frauds, a contract for the sale of real estate is not enforceable unless it, or a memorandum of it, is in writing and signed by the person to be charged with the contract. Tex. Bus. & Com.Code Ann. § 26.01(a), (b)(4) (Vernon 2009). For a contract concerning the conveyance of real estate to satisfy the statute of frauds, "the

writing must furnish within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty." *Wilson v. Fisher,* 144 Tex. 53, 188 S.W.2d 150, 152 (1945). This applies to a purchase option in a contract. *See Matney v. Odom,* 147 Tex. 26, 210 S.W.2d 980, 981–82 (1948) (applying statute of frauds analysis to purchase option in contract). Whether a contract falls within the statute of frauds is a question of law. *Iacono v. Lyons,* 16 S.W.3d 92, 94 (Tex.App.-Houston [1st Dist.] 2000, no pet.).

The purpose of a description in a written conveyance is not to identify the land, but to afford a means of identification. *Jones v. Kelley,* 614 S.W.2d 95, 99–100 (Tex.1981). While we apply a strict application of the statute of frauds, we allow for a liberal construction of the words describing the land. *Gates v. Asher,* 154 Tex. 538, 280 S.W.2d 247, 248 (1955).

A metes-and-bounds description is not required to satisfy the statute of frauds. *Tex. Builders v. Keller,* 928 S.W.2d 479, 481 (Tex.1996). Similarly, a plat in a recorded property description is not required. *Nguyen v. Yovan,* 317 S.W.3d 261, 269 (Tex.App.-Houston [1st Dist.] 2009, pet. denied). Nor does the description of the property require "[c]onviction beyond all peradventure of doubt." *Gates,* 280 S.W.2d at 249;*see also Templeton v. Dreiss,* 961 S.W.2d 645, 659 (Tex.App.-San Antonio 1998, pet. denied) (holding mathematical certainty not required). Instead, only proof within "reasonable certainty" is required. *Gates,* 280 S.W.2d at 249.

"If enough appears in the description so that a party familiar with the locality can identify the premises with reasonable certainty, it will be sufficient." *Id.* at 248–49. Generally speaking, a property can be identified with reasonable certainty if it identifies the general area of the land and "contains information regarding the size, shape, and boundaries." *Reiland v. Patrick Thomas Props., Inc.,* 213 S.W.3d 431, 437 (Tex.App.-Houston [1st Dist.] 2006, pet. denied);*accord Fears v. Tex. Bank,* 247 S.W.3d 729, 736 (Tex.App.-Texarkana 2008, pet. denied).

"[W]hen construing a conveyance, the court does not look at terms in isolation; rather, it must give effect to all parts of the conveyance and construe the document as a whole." *Plainsman Trading Co. v. Crews,* 898 S.W.2d 786, 789 (Tex.1995). When a contract includes a map of the property to be conveyed as a part of its description of the property, this is included in the analysis of whether the description satisfies the statute of frauds. *Matney,* 210 S.W.2d at 984;*U.S. Enters., Inc. v. Dauley,* 535 S.W.2d 623, 628 (Tex.1976). "Whether a map is helpful in remedying descriptive defects of the contract depends on whether the missing details are shown on the map." *U.S. Enters.,* 535 S.W.2d at 628.

While parol evidence may be considered under certain circumstances, it cannot be used to supply the "essential elements" of the contract. *Wilson,* 188 S.W.2d at 152. In contrast, it can be used *57 to "explain or clarify the essential terms appearing in the" contract. *Id.*

If it does not sufficiently describe the land to be conveyed, a conveyance of an interest in real property is void and unenforceable under the statute of frauds. *Nguyen,* 317 S.W.3d at 267.

In order to determine if the purchase option under the sublease is barred by the statute of frauds, we must determine if the property to be sold under the sublease is identified with reasonable certainty. *Wilson,* 188 S.W.2d at 152. We begin by noting that the entire property subject to the lease is described by three metes-and-bounds descriptions. The lease identifies the property subject to the lease as the property "described on Exhibit A" of the lease. Exhibit A of the lease is a metes-and-bounds description of three tracts of land.

The sublease expressly incorporated the lease by reference, and made the lease "a part [of the sublease] for all purposes." Additionally, the

purchase option in the sublease expressly recognizes The Rex Group's authority to purchase the premises covered by the lease and defines those premises as the "Entire Base Lease Premises." The sublease then allows Ardmore to purchase a portion of the Entire Base Lease Premises, provided that The Rex Group exercises its right to purchase the Entire Base Lease Premises.

The question we must answer, then, is whether the portion of the Entire Base Lease Premises that was a part of the purchase option in the sublease was sufficiently identified. *See Matney,* 210 S.W.2d at 982 (considering whether portion of larger identified property was sufficiently identified).

The sublease identifies the portion subject to its purchase option as "that portion of the Entire Base Lease Premises ... as is depicted on the drawing attached hereto as *Exhibit D.*" Exhibit D is a map of the premises, including designations of the buildings on the premises at the time of the creation of the sublease. There are three main markings on Exhibit D. It contains an irregular loop around certain buildings on the map. It contains a dashed line that intersects the property from Highway 288 to Ardmore Street. It also contains a solid line that follows the same basic path as the dashed line. On either end of the two lines are two arrows that point in the same direction. Next to one of the arrows is a notation that says "property covered by option."

The Rex Group focuses on the irregular loop and the arrows on the map, arguing that these drawings are too vague to identify the property subject to the sublease's purchase option. Ardmore, in contrast, focuses on the solid line and arrows on the map, arguing this is sufficient to satisfy the statute of frauds. We hold that Ardmore's explanation of the markings on Exhibit D is supported by the record.

Andrews, one of the representatives for Ardmore, prepared Exhibit D to the sublease. In his deposition, Andrews testified that he prepared both Exhibit A and Exhibit D. He further testified that both exhibits were drafted from the same basic drawing. Andrews acknowledged that there were already markings on the basic drawing used to prepare the exhibits. Exhibit A defined the premises to be leased, and Exhibit D defined the premises subject to the purchase option. To that end, Andrews testified, Exhibit A contains a line that "more heavily note[s]" the subleased area. The markings added to Exhibit D showed what would be subject to the purchase option.

This testimony is borne out by a review of the two exhibits. Both exhibits contain the irregular loop and the dashed line. 58 *58 Exhibit A adds the heavier line, which follows the basic path of the irregular loop. It also adds some shaded areas with arrows indicating that the shaded areas were a shared drive. In contrast, Exhibit D adds the solid line, which follows the same basic path of the dashed line. It also adds the arrows at the top and bottom of the solid line and the notation "property covered by option."

While Andrews's testimony is parol evidence, it falls within the exception of when parol evidence can be considered. *See Wilson,* 188 S.W.2d at 152 (holding parol evidence can be used to "explain or clarify the essential terms appearing in the contract"); *see also David J. Sacks, P.C. v. Haden,* 266 S.W.3d 447, 450 (Tex.2008) (per curiam) (holding when contract contains ambiguity, courts can admit extraneous evidence to determine true meaning of contract).[1] Because there were multiple markings on Exhibit D, Andrews's testimony may be used to clarify the meaning of the markings.

[1] While The Rex Group argues that the irregular loop formed the property subject to the sublease's purchase option, it presented no evidence that this in any way reflected the intent of the parties. Accordingly, whether this alternative interpretation satisfies the statute of frauds is not before us. *See Travis v. City of Mesquite,* 830 S.W.2d 94, 100 (Tex.1992)

(holding appellate courts may only review issues "actually presented to and considered by the trial court"); *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 677 (Tex.1979) (holding that trial court may not grant summary judgment on ground not presented by movant in writing).

We are left, then, with a map of the Entire Base Lease Premises with a line running through the parking lot, midway between two groups of buildings, and notations indicating that the property covered by the purchase option is everything to one side of this line. To put it another way, the property subject to sale under the sublease can be identified with a metes-and-bounds description—by reference to the property description in the lease, which contains a metes-and-bounds description of the entire premises—on three out of four of its borders. Whether the fourth border—the hand-drawn line running through the premises—can be identified with reasonable certainty determines whether the purchase option under the sublease satisfies the statute of frauds.

The Rex Group argues that the map is too ambiguous to identify the property subject to the sublease's purchase option with reasonable certainty. To support this argument, The Rex Group relies on *U.S. Enters.,* 535 S.W.2d at 623 and *Guenther v. Amer–Tex Constr. Co.,* 534 S.W.2d 396 (Tex.Civ.App.-Austin 1976, no writ).

In *U.S. Enterprises,* the Texas Supreme Court recognized that, when a map is included as a part of a property description, it "becomes a part of the written contract and can aid a defective written description if the map contains enough necessary descriptive information." 535 S.W.2d at 628. In that case, the written description of the land to be sold was 10 tracts of land out of three identified surveys in Wise County, Texas. *Id.* at 625. The 10 tracts were generally identified in the written description. *Id.* The written description also said that the tracts—other than certain identified tracts—were identified on a map marked as Exhibit A. *Id.*

The issue for the court to resolve was whether two of the 10 tracts were properly identified in the contract, including the map. *Id.* at 626–27. It was undisputed that, without the map, the two tracts were not sufficiently identified. *Id.* at 628. The court held that the map did not correct this inadequacy because there was nothing on the map
59 "which supplies any aid as to *59 the name or location of" the tracts at issue. *Id.* U.S. Enterprises sought to establish by parol evidence that the two tracts were located on the map, but the court held that—even if this were a proper use of parol evidence—the proffered evidence did not show *where* on the map the two properties were. *Id.* at 629. Accordingly, even if admissible, it was insufficient. *Id.*

In *Guenther,* the only reference to the land to be conveyed was a map. 534 S.W.2d at 396–97. The map referenced two roads, two fences, and a utility line to establish the boundaries of the land. *Id.* One of the fences bordered a park. *Id.* The court recognized that the two roads and the fence bordering the park could likely be found. *Id.* at 398. It held, however, that the type of utility line—such as electric, telephone, or gas—forming one of the borders was not identified. *Id.* Even if this utility line could be identified, the last border was a fence that was not identified in any way. *Id.* Because there was no indication of the location of the fence, the size of the property or the length of the borders, there was no information to fill in what would be needed to identify this last border either. *See id.*

We find this case to be easily distinguishable from *U.S. Enterprises* and *Guenther.* Unlike *U.S. Enterprises,* the map consists only of the property subject to the lease's purchase option and the portion of that property that is subject to the sublease's purchase option is demarcated. Unlike *Guenther,* three of the four boundaries can be

identified with metes-and-bounds descriptions, leaving only one line that is not identified at that level of detail.

We hold that this last line on Exhibit D of the sublease can be identified with reasonable certainty. There is enough detail on the map—including designations of buildings on the premises—to show fairly clearly where this last line falls. While the location of the line is not identified with exact precision, this is not required to satisfy the statute of frauds. *See Gates,* 280 S.W.2d at 249 (holding "[c]onviction beyond all peradventure of doubt" is not required); *Templeton,* 961 S.W.2d at 659 (holding mathematical certainty is not required).

Additionally, as Ardmore points out, the property subject to the sublease's purchase option has been identified by a land surveyor. Roth, the surveyor, testified in his affidavit that he was familiar with the locality of the property subject to the sublease's purchase option, that he "was able to identify and determine the boundaries of the Option Property with reference to the description thereof provided in the sublease and Exhibit D thereto," and that the property could be identified with reasonable certainty. He included with his affidavit a metes-and-bounds description of the property subject to the sublease's purchase option based on the property description.

The Rex Group argues that Roth's affidavit and attached metes-and-bounds description cannot be considered because after-the-fact parol evidence cannot be used to cure an inadequate description in a contract. It is true that, the information required to satisfy the statute of frauds must be in the document "or by reference to some other *existing* writing." *Wilson,* 188 S.W.2d at 152 (emphasis added). It is also true that parol evidence cannot be used to supply the essential requirements to satisfy the statute of frauds. *Id.* at 57, 188 S.W.2d at 152. Roth's affidavit and attached metes-and-bounds description do not function in violation of either of these rules, however. Instead, they function to show "that a party familiar with the locality can identify the premises with reasonable certainty." *Gates,* 280 S.W.2d at 248–49;*see also* *60 *Dixon v. Amoco Prod. Co.,* 150 S.W.3d 191, 195 (Tex.App.-Tyler 2004, pet. denied) (holding testimony of surveyor can be admitted to show that property can be identified with reasonable certainty); *Foster v. Bullard,* 496 S.W.2d 724, 733 (Tex.Civ.App.-Austin 1973, writ ref'd n.r.e.) (holding parol evidence can be considered to show property can be identified with reasonable certainty).

The Rex Group included evidence of its own surveyor, who asserted in an affidavit that the property subject to the sublease cannot be identified with reasonable certainty. At best, however, this creates a fact issue. We must review the evidence in the light most favorable to Ardmore, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding,* 289 S.W.3d at 848 (citing *City of Keller,* 168 S.W.3d at 827). Additionally, we must indulge every reasonable inference and resolve any doubts in Ardmore's favor. *See Sw. Elec. Power Co. v. Grant,* 73 S.W.3d at 215. The affidavit of The Rex Group's surveyor does not overcome the affidavit of Ardmore's surveyor. As a result, The Rex Group was not entitled to judgment as a matter of law.

In this way, this case is similar to *W. Beach Marina, Ltd. v. Erdeljac,* 94 S.W.3d 248 (Tex.App.-Austin 2002, no pet.). In *West Beach Marina,* the property at issue was identified by "a hand-drawn sketch superimposed on an elevation map that indicates the location of" the relevant property. *Id.* at 265. Both parties presented testimony from a surveyor. *Id.* at 266. During a bench trial, one surveyor asserted he could not identify the property with reasonable certainty, while the other surveyor testified that he could identify it and created a metes-and-bounds description of the property. *Id.* The court of appeals held that the trial court did not err in

relying on the other surveyor's testimony and accepting that the property could be identified with reasonable certainty. *Id.*

The same reasoning is applicable here. The property description contained with the sublease is not so vague or ambiguous as to render its boundaries indeterminable. Additionally, the record shows that a surveyor, using the information contained in or referenced by the sublease, was able to identify the property with reasonable certainty. Accordingly, we hold that the trial court erred by determining, as a matter of law, that the property subject to the sublease's purchase option could not be identified with a reasonable certainty.[2]

[2] Because we hold that the trial court could not determine as a matter of law that the statute of frauds barred the enforcement of the purchase option in the sublease, we do not reach Ardmore's remaining arguments concerning the application of certain exceptions to the statute of frauds. *See*Tex.R.App. P. 47.1 (requiring appellate courts to address every issue raised and *necessary* to final disposition of the appeal).

In the remainder of its first issue, Ardmore argues that, if we reverse the trial court's summary judgment in favor of The Rex Group, we must also reverse the trial court's award of attorneys' fees in favor of The Rex Group. The Rex Group acknowledges this is the law, and we agree. *See Bd. of Med. Exam'rs v. Nzedu,* 228 S.W.3d 264, 276 (Tex.App.-Austin 2007, pet. denied) (holding that reversal of declaratory judgment act claim also requires reversal of award of attorneys' fees for new determination of equitable and just award). Accordingly, we reverse the trial court's award of attorneys' fees in favor of The Rex Group and against Ardmore.

61 We sustain Ardmore's first issue.*61

Ardmore's second issue concerns whether the trial should have granted summary judgment in favor of Ardmore and against The Rex Group.

When a party moves for summary judgment on a claim for which it bears the burden of proof, it must show that it is entitled to prevail on each element of its cause of action. *See Parker,* 98 S.W.3d at 299. When, as here, the parties file cross-motions for summary judgment on overlapping issues, and the trial court grants one motion and denies the other, we review the summary judgment evidence supporting both motions and "render the judgment that the trial court should have rendered." *FM Props.,* 22 S.W.3d at 872.

Ardmore's counter-petition against The Rex Group seeks specific performance of the purchase option, arguing that it had exercised the purchase option and that it "is ready, willing, and able to complete its purchase of the property." Ardmore argued the same thing in its motion for summary judgment. In its prayer, Ardmore asked the court to "enter judgment decreeing specific performance, requiring [The Rex Group] to convey the property described in Exhibit 'D' to the sublease to [Ardmore] in accordance with the terms and conditions of the sublease."

Ardmore's only summary judgment evidence, however, concerned whether the purchase option was unenforceable under the statute of frauds. Its motion for summary judgment did not present any legal authority for what was required to entitle it to specific performance of the purchase option. Nor did it present any evidence to establish that it had done everything required to entitle it to specific performance. *See*Tex.R. Civ. P. 166a(c) (requiring movant to establish with competent evidence that it is entitled to judgment as a matter of law). Accordingly, we hold that the record does not permit us to render judgment in favor of Ardmore and against The Rex Group.

We overrule Ardmore's second issue.

Bench Trial on Attorneys' Fees

In a cross-appeal, The Rex Group challenges the sufficiency of the evidence to support the trial court's award of attorneys' fees in favor of The Rex Group and against Star Properties.

A. Standard of Review

In conducting a legal sufficiency review of the evidence, we consider all of the evidence in a light favorable to the verdict and indulge every reasonable inference that supports it. *City of Keller,* 168 S.W.3d at 827. We consider evidence favorable to the finding if a reasonable factfinder could consider it, and disregard evidence contrary to the finding unless a reasonable factfinder could not disregard it. *Id.* at 827. In conducting a factual sufficiency review, we consider all of the evidence supporting and contradicting the challenged finding and set it aside only if the evidence is so weak as to make it clearly wrong and manifestly unjust. *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex.1986); *see also Plas–Tex, Inc. v. U.S. Steel Corp.,* 772 S.W.2d 442, 445 (Tex.1989). In an appeal of a judgment rendered after a bench trial, we may "not invade the fact-finding role of the trial court, who alone determines the credibility of the witnesses, the weight to give their testimony, and whether to accept or reject all or any part of that testimony." *Volume Millwork, Inc. v. W. Hous. Airport Corp.,* 218 S.W.3d 722, 730 (Tex.App.-Houston [1st Dist.] 2006, pet. denied).

B. Analysis

In the bench trial on the issue of attorneys' fees,
62 The Rex Group presented *62 evidence that it had incurred $209,552 in attorneys' fees. It also presented expert testimony concerning whether the fees were reasonable and necessary based on *Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W.2d 812, 818 (Tex.1997) (quoting Tex. Disciplinary Rules Prof'l 1 Conduct R. 1.04, *reprinted in* Tex. Gov't Code Ann. tit. 2, subtit. G, app. A (Vernon Supp. 2011) (Tex. State Bar R., art. X, § 9)).

During the bench trial, it was established that Star Properties had incurred about $120,000 in attorneys' fees for about 410 hours of work through the time that summary judgment was rendered against it. Star Properties' attorney then acknowledged to the trial court that it was "in no position to deny that [$]120,000 is reasonable in the case."

Ultimately, the trial court awarded $85,000 in attorneys' fees in favor of The Rex Group and against Star Properties. On appeal, The Rex Group argues the trial court abused its discretion by only awarding $85,000 in attorneys' fees based on Star Properties' attorney's statement. Specifically, The Rex Group argues,

Thus the record contains undisputed evidence that Rex's reasonable and necessary attorneys' fees against Star were at least $120,000. This conclusion in turn triggers a series of subsidiary conclusions: (1) that as a matter of law the evidence contradicts the trial court's implied finding that only an $85,000 fee was reasonable and necessary; (2) that the finding is against the great weight and preponderance of the evidence; and (3) that the trial court abused its discretion in setting the fee at $85,000.

The Rex Group does not cite to any legal authority to show why the statement made during closing arguments by Star Properties' attorney would constitute evidence or would otherwise be binding on the trial court. Star Properties' attorney's statement does not constitute a judicial admission. "A judicial admission results when a party makes a statement of fact which conclusively disproves a right of recovery or defense he currently asserts." *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.,* 979 S.W.2d 730, 740 (Tex.App.-Houston [14th Dist.] 1998, no pet.). The elements for establishing that a statement is a judicial admission are (1) the statement must be made in the course of a judicial proceeding; (2) it must be contrary to an essential fact or defense asserted by the party; (3) it must be deliberate, clear, and

unequivocal; (4) it cannot be destructive of the opposing party's theory of recovery or defense; and (5) enforcing the statement as a judicial admission would be consistent with public policy. *Kaplan v. Kaplan,* 129 S.W.3d 666, 669 (Tex.App.-Fort Worth 2004, pet. denied). The public policy concerning judicial admissions is that it would be unjust to permit a party to recover after he has sworn himself out of court by a clear, unequivocal statement. *Id.*

Star Properties' attorney's recognition that it would risk appearing hypocritical arguing it should be entitled to $120,000 in attorneys' fees but that The Rex Group should be entitled to less for work done during the same period is not tantamount to a deliberate, clear, and unequivocal admission that $120,000 is inherently reasonable and necessary. *See id.*

Moreover, unsworn statements of counsel generally do not constitute evidence. *See Banda v. Garcia,* 955 S.W.2d 270, 272 (Tex.1997); *see also Vaughn v. Tex. Emp't Comm'n,* 792 S.W.2d 139, 144 (Tex.App.-Houston [1st Dist.] 1990, no writ) (holding unsworn attorney's statement does not constitute evidence to support award of attorneys' fees). The Rex Group offers no argument as to why Star *63 Properties' attorney's statement should be excepted from this rule. Accordingly, we hold that this statement did not preclude the trial court from performing its obligation to determine what were reasonable and necessary attorneys' fees.

We overrule The Rex Group's sole issue.

Conclusion

We reverse the trial court's grant of summary judgment in favor of The Rex Group and against Ardmore as well as its award of attorneys' fees in favor of The Rex Group and against Ardmore. We affirm the judgment in all other respects. We remand this case to the trial court for further proceedings.

No. 2-98-257-CV
Court of Appeals of Texas, Second District, Fort Worth

Cadle Co. v. Lobingier

50 S.W.3d 662 (Tex. App. 2001)
Decided Jun 21, 2001

No. 2-98-257-CV.

663 Delivered June 21, 2001. *663

Appeal From The 67th District Court Of Tarrant
664 County. *664

Alan Wilson, Fort Worth, F. Dean Armstrong, Flossmoor, IL, Rittenhouse and Savant, P.C., William W. Rittenhouse, Austin, for Appellant.

Bourland, Kirkman, Seidler Evans, L.L.P., David L. Evans, Thomas M. Michel, Fort Worth, for Appellee.

EN BANC and RICHARDS, J. (Sitting by Assignment).

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OPINION ON EN BANC REVIEW

DAY, JUSTICE.

I. Introduction

After reviewing David B. Lobingier's motion for en banc review, we grant the motion in part and deny it in part. We withdraw our opinion and judgment of October 5, 2000 and substitute the following in their place.

In this appeal, The Cadle Company (Cadle), Daniel C. Cadle a/k/a Dan Cadle (Daniel), and Citizens Against Corrupt Attorneys (CACA) attack three separate judgments: this court's 1996 contempt judgment, the trial court's arrearage judgment, and the trial court's 1998 contempt judgment. We dismiss in part and reverse and render in part.

II. 1996 Contempt Judgment

In November 1992, Lobingier obtained a judgment against Cadle for $300,000. Cadle unsuccessfully appealed that judgment to this court, the Texas Supreme Court, and the United States Supreme Court. *See Cadle Co. v. Bankston Lobingier,* 868 S.W.2d 918 (Tex.App.-Fort Worth), *writ denied per curiam,* 893 S.W.2d 949 (Tex. 1994), *cert. denied,* 516 U.S. 810 (1995). The judgment was never superseded and was not paid until January 11, 1999.

In January and December 1995, Lobingier obtained two turnover orders in the trial court against Cadle and Daniel in an attempt to collect the $300,000 judgment. In July 1996, we held Cadle and Daniel in contempt of court for failing to comply with the 1995 turnover orders.

In several of their points, the Cadles[1] collaterally attack our 1996 contempt judgment, asserting it is void. Where, as here, the contemnor is not restrained, mandamus is the proper vehicle for collaterally attacking a contempt judgment. *In re Long,* 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding). The Cadles have twice attacked our 1996 contempt judgment via petition for writ of mandamus to the Texas Supreme Court on the very grounds they now assert in this appeal. Both times the supreme court has denied the petitions.[2]

Accordingly, except to explain the basis for our civil contempt order, we will not revisit those issues a third time.

[1] For simplicity, we sometimes refer to The Cadle Company and Daniel Cadle collectively as "the Cadles."

[2] *See In re The Cadle Co.,* No. 99-570 (Tex. 1999) (orig. proceeding) (unpublished order); *In re The Cadle Co.,* No. 98-666 (Tex. 1998) (orig. proceeding) (unpublished order).

III. Civil v. Criminal Contempt

Our 1996 contempt judgment imposed on the Cadles a $500-per-day fine for every day after the date of the judgment that they did not comply with the 1995 turnover orders. The Cadles assert we could not assess the $500-per-day fine because a per diem fine for two isolated acts of contempt — 667 the violation of two *667 turnover orders — is impermissible under section 21.001(b) of the government code. This argument is based on the incorrect assumption that the fine is a criminal contempt fine, when it is actually a civil contempt fine. As we discuss below, criminal contempt sanctions are limited by section 21.001(b), but civil contempt sanctions are not.

There are two types of contempt: civil and criminal. The classifications of civil and criminal contempt have nothing to do with the characterization of the underlying case or the burdensomeness of the contempt order. *Ex parte Powell,* 883 S.W.2d 775, 778 (Tex.App.-Beaumont 1994, orig. proceeding); *Ex parte Johns,* 807 S.W.2d 768, 771 (Tex.App.-Dallas 1991, orig. proceeding). Rather, the distinction between civil and criminal contempt lies in the nature and purpose of the penalty imposed. *Ex parte Busby,* 921 S.W.2d 389, 391 (Tex.App.-Austin 1996, pet. ref'd); *see also Shillitani v. United States,* 384 U.S. 364, 369-70, 86 S.Ct. 1531, 1535 (1966) ("`It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish' civil from criminal contempt. . . . The test may be stated as: what does the court primarily seek to accomplish by imposing sentence?").

In a civil contempt order, the court exerts its contempt power to persuade the contemnor to obey a previous order, usually through a conditional penalty. Because the contemnor can avoid punishment by obeying the court's order, the contemnor is said to "carr[y] the keys of imprisonment in his own pocket." *Busby,* 921 S.W.2d at 391 (citing *Johns,* 807 S.W.2d at 770); *see also Ex parte Werblud,* 536 S.W.2d 542, 545 (Tex. 1976) (orig. proceeding). Conversely, a criminal contempt order is punitive in nature and is an exertion of the court's inherent power to punish a contemnor for some completed act that affronted the court's dignity and authority. In criminal contempt proceedings, the court punishes the contemnor for improper past acts, and no subsequent voluntary compliance can enable the contemnor to avoid punishment. *Busby,* 921 S.W.2d at 391.

Our 1996 contempt judgment contains a "hybrid" contempt order that assesses sanctions for both civil and criminal contempt. *See Ex parte Sanchez,* 703 S.W.2d 955, 957 (Tex. 1986) (orig. proceeding) (recognizing that courts can incorporate both forms of contempt into one order). The civil contempt part of the order imposes a prospective, $500-per-day fine from the date of the judgment forward to coerce the Cadles' future compliance with the 1995 turnover orders. The Cadles controlled the amount of this fine and could have avoided paying it altogether or stopped its accrual by complying with the turnover orders. The criminal contempt part of the order, which is governed by section 21.001(b), punishes Daniel with 180 days in jail for refusing to comply with the turnover orders up through the date of our contempt judgment.[3] Daniel could not avoid this punishment once it was imposed, regardless of whether he later complied with the turnover orders.

3 The writ of commitment was issued but never executed because Daniel is out of state.

The cases the Cadles rely on to challenge our civil contempt fine are inapposite because they all involve fines for criminal contempt.[4] Section 668 21.002 allows *668 a court to punish each act of criminal contempt with a fine of not more than $500 or confinement in the county jail for not more than six months, or both. Tex. Gov't Code Ann. § 21.002(b) (Vernon Supp. 2001). Because our fine is civil, however, it is not governed by section 21.002. *See Ex parte Shaklee,* 939 S.W.2d 144, 145 n. 2 (Tex. 1997) (orig. proceeding) (noting that section 21.002(b) sets out maximum punishment for *criminal* contempt); *In re Cantu,* 961 S.W.2d 482, 489 (Tex.App.-Corpus Christi 1997, orig. proceeding) (stating that section 21.002(b) merely sets out punishments allowed for criminal contempt and that coercive confinement for civil contempt is not limited by section 21.002(b)); *Ex parte Hawkins,* 885 S.W.2d 586, 588 (Tex.App.-El Paso 1994, orig. proceeding) (holding that punishment for criminal contempt — but not civil contempt — is limited by section 21.002(b)); *see also* Tex. Gov't Code Ann. § 21.002(e) (Vernon Supp. 2001) (providing that section 21.002 "does not affect a court's power to confine a contemnor to compel him to obey a court order").

4 *See, e.g., Long,* 984 S.W.2d at 625 (holding that fining district clerk $500 per day for past violations of injunction, which ordered him not to collect certain filing fees, would be impermissible absent proof that at least one lawsuit was filed each day, including weekends and holidays); *Ex parte Hudson,* 917 S.W.2d 24, 25 (Tex. 1996) (orig. proceeding) (contemnor held in contempt and fined for past failure to comply with injunction requiring him to clean up his property); *Rosser v. Squier,* 902 S.W.2d 962, 962 (Tex. 1995) (orig. proceeding) (contemnor fined for six prior acts of contempt); *Ex parte Carey,* 704 S.W.2d 13, 14 (Tex. 1986) (orig. proceeding) (contemnor fined for past failure to comply with two court orders requiring him to submit to blood test in paternity suit).

The Cadles concede that indefinite, coercive confinement to induce compliance with a court order is authorized by section 21.002(e), but assert section 21.002 does not authorize the assessment of a daily coercive fine. While section 21.002 does not expressly authorize a coercive fine, it does not prohibit one. Although we could find no Texas case law directly on point, in the federal system, a coercive fine "is a standard remedy in civil contempt." *Blankenship Assocs. v. NLRB,* 54 F.3d 447, 450 (7th Cir. 1995). "A close analogy to coercive imprisonment is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged." *Int'l Union v. Bagwell,* 512 U.S. 821, 829, 114 S.Ct. 2552, 2558 (1994); *see also Alberti v. Klevenhagen,* 46 F.3d 1347, 1359 (5th Cir. 1995) (upholding district court's imposition of prospective, per-inmate fine imposed to alleviate prison overcrowding).

We believe a coercive fine is appropriate here because the unique circumstances of this case would render an order for coercive confinement meaningless. Cadle is an entity and therefore is not subject to coercive confinement. Daniel is an out-of-state resident whose extradition to Texas would likely be a lengthy and costly process.[5] Accordingly, we included the coercive fine in our 1996 contempt judgment.

5 The Cadles' brief states: "Since the date of the judgments of contempt against Dan Cadle, he has not been able to set foot in the State of Texas for fear of incarceration pursuant to the punitive . . . 180-day confinement period" in the 1996 contempt judgment.

IV. Arrearage Judgment

As we discussed, our 1996 contempt judgment fined the Cadles $500 per day from the date of the judgment until they complied with the two 1995 turnover orders issued by the trial court.[6] Nearly two *669 years later, in May 1998, when the Cadles still had not complied with the turnover orders, the trial court reduced the $500-per-day fine to judgment and rendered an arrearage judgment for Lobingier in the amount of $346,500.

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[6] Our July 1996 contempt judgment was rendered after we affirmed the first of the 1995 turnover orders and while the second was on appeal. *See In re Gabbai,* 968 S.W.2d 929, 931 (Tex. 1998) (orig. proceeding) (holding that appellate court has exclusive jurisdiction to enforce orders being appealed, regardless of whether contempt occurred before or after appellate court acquired jurisdiction).

Our 1996 contempt judgment did not make the coercive fine payable to Lobingier, and the Cadles assert the trial court erred by rendering judgment that the fine was payable to Lobingier rather than the sovereign. A contempt fine is not payable to a private litigant. *Rosser,* 902 S.W.2d at 962; *Edrington v. Pridham,* 65 Tex. 612, 617 (1886). Thus, the trial court erred by making the amount of the arrearage judgment payable to Lobingier.

Lobingier contends the contempt fine should be payable to him because a civil contempt fine is for the benefit of the litigant. *See Ex parte Dolenz,* 893 S.W.2d 677, 680 (Tex.App.-Dallas 1995, orig. proceeding) (noting that court's civil or coercive power is remedial in nature for the benefit of the complainant). The fact that a civil contempt fine is for a litigant's benefit does not mean the fine should be paid to the litigant. Rather, the litigant benefits when the contemnor complies with the court's order to avoid paying the fine altogether or to stop its accrual. Indeed, the *Dolenz* court referred to a court's power of coercive *confinement* as being for the complainant's benefit. *Id.* Coercive confinement does not benefit the complainant financially apart from inducing the contemnor's compliance with a court order.[7]

[7] In the federal system, a civil contempt fine is designed either to coerce the defendant into complying with the court's order or to compensate the complainant for losses sustained. *See Int'l Union,* 512 U.S. at 829, 114 S.Ct. at 2558; *United States v. United Mine Workers,* 330 U.S. 258, 303-04, 67 S.Ct. 677, 701 (1947). The purpose of our July 1996 contempt judgment was not to compensate Lobingier financially with the fine, but to induce Cadle to comply with the trial court's turnover orders so the $300,000 judgment would be satisfied. The record shows that Cadle has complied with the turnover orders and paid the $300,000 judgment with interest. Under the circumstances of this case, we decline to hold that a compensatory civil contempt fine would be proper.

Lobingier contends that we should not address the propriety of the arrearage judgment because whether he is entitled to recover the contempt fine pertains to his capacity to sue and was not properly raised via verified pleading in the trial court. *See Nootsie, Ltd. v. Williamson County App. Dist.,* 925 S.W.2d 659, 662 (Tex. 1996) (holding that complaint about lack of capacity must be raised by verified pleading or is waived on appeal). A party has capacity to sue when he has legal authority to act, regardless of whether he has a justiciable interest in the controversy. *Id.* at 661. Generally, the lack of capacity to sue pertains to the legal right to prosecute a lawsuit in one's own name. *Cleaver v. George Staton Co.,* 908 S.W.2d 468, 469 (Tex.App.-Tyler 1995, writ denied). The circumstances affecting capacity to sue include, but are not limited to, infancy, assumed names, alienage, insanity, executor status, and status as a corporate plaintiff. *Hotze v. Brown,* 9 S.W.3d 404, 413 (Tex.App.-Houston [14th Dist.] 1999, pet. granted) (op. on reh'g).

In contrast, standing pertains to a person's justiciable interest in the suit. *Roman Forest Pub. Util. Dist. v. McCorkle,* 999 S.W.2d 931, 932 (Tex.App.-Beaumont 1999, pet. denied); *AU Pharm., Inc. v. Boston,* 986 S.W.2d 331, 340 (Tex.App.-Texarkana 1999, no pet.). A person has
670 *670 standing to sue when he is personally aggrieved by the alleged wrong. *Nootsie,* 925 S.W.2d at 661. Without a breach of a legal right belonging to a plaintiff, however, he has no standing to litigate. *Pankhurst v. Weitinger Tucker,* 850 S.W.2d 726, 729 (Tex.App.-Corpus Christi 1993, writ denied). Because standing is a component of subject matter jurisdiction, lack of standing may be raised at any time. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 445-46 (Tex. 1993).

In this case, the Cadles asserted in the trial court that Lobingier had no legal right to the contempt sanctions assessed in our 1996 contempt judgment and reduced to judgment in the arrearage judgment. On appeal, the Cadles argue that Lobingier has no standing to enforce our 1996 contempt judgment because the judgment did not award the contempt fine to him. These are lack of standing arguments. Lobingier was personally aggrieved by the Cadles' failure to comply with the turnover orders that gave rise to this court's issuance of the 1996 contempt judgment. But Lobingier was not, and could not be, personally aggrieved by the Cadles' failure to pay the contempt fine because he was not entitled to it. Indeed, the trial court rendered the arrearage judgment on May 27, 1998, but the Cadles did not comply with the turnover orders until January 11, 1999. Lobingier does not assert that he is entitled to recover the portion of the contempt fine that accrued between May 1998 and January 1999. Because Lobingier was not entitled to the contempt fine, he had no justiciable interest in a suit to determine the amount of coercive contempt sanctions the Cadles owed due to their failure to comply with our 1996 contempt judgment.

Lobingier contends that he had standing to seek enforcement of our 1996 contempt judgment because contempt proceedings are initiated by private aggrieved parties. He contends that only he, not the State of Texas, could have sought to enforce the 1996 contempt judgment.

Lobingier cites no authority to support these arguments except a case stating the general proposition that a litigant has the right to institute a contempt proceeding. *See Kruegel v. Williams,* 153 S.W. 903, 904 (Tex.Civ.App.-Dallas 1913, writ ref'd) (holding that party interested in judgment may institute contempt proceeding to ensure its enforcement). This case is not on point because the arrearage judgment did not result from a contempt proceeding; it resulted from an enforcement proceeding. In addition, Lobingier was not the only person who could have sought enforcement of our 1996 contempt judgment. This court has authority to enforce its own contempt judgments. *See Gabbai,* 968 S.W.2d at 931 (stating that courts possess inherent power to enforce their own orders through contempt proceedings, but generally lack authority to enforce another court's orders by contempt).

We hold Lobingier cannot recover the contempt fine from the Cadles. However, as we discuss in section VI, below, the Cadles are liable for civil contempt sanctions payable to this court.

V. 1998 Contempt Judgment

Despite its unsuccessful appeal of the $300,000 judgment, Cadle insisted Lobingier had wrongfully obtained the judgment. In April 1995, Daniel formed CACA and, in June 1995, Cadle and CACA sued Lobingier in Trumbull County, Ohio, alleging Lobingier had violated the Racketeer Influenced and Corrupt Organizations Act (RICO) and tortiously interfered with Cadle's business activities. Cadle assigned its claims against Lobingier to CACA for $1000 and ten
671 percent of any recovery in the Ohio lawsuit. *671

In August 1995, Lobingier sought and obtained an injunction against Cadle and CACA. The August 1995 injunction enjoined Cadle and CACA from:

> "prosecuting or proceeding in any fashion" with the Ohio lawsuit, except to respond to orders from the Ohio court and to file documents necessary to dismiss the Ohio lawsuit;
>
> filing in any other jurisdiction a lawsuit similar to the Ohio lawsuit, except in the original court and cause number in which the $300,000 judgment had been rendered;
>
> seeking to prevent or stay the collection of the $300,000 judgment, except in the original court and cause number.

In October 1998, the trial court held Cadle, Daniel, and CACA in contempt of court for violating the temporary injunction. The Cadles and CACA appealed the 1998 contempt judgment in September 1998. In April and May 1999, the Cadles and CACA, petitioned this court for mandamus relief from the 1998 contempt judgment. We denied the Cadles' petition on May 6, 1999 and CACA's petition on May 11, 1999.[8] The Cadles and CACA then petitioned the Texas Supreme Court for mandamus relief from the 1998 contempt judgment. The supreme court denied relief on September 9, 1999 and December 2, 1999.[9]

[8] *See In re The Cadle Co.*, No. 2-99-137-CV (Tex.App.-Fort Worth 1999, orig. proceeding) (not designated for publication); *In re Citizens Against Corrupt Attorneys,* No. 2-99-159-CV (Tex.App.-Fort Worth 1999, orig. proceeding) (not designated for publication).

[9] *See In re The Cadle Co.,* No. 99-0571 (Tex. 1999) (orig. proceeding) (unpublished order); *In re Citizens Against Corrupt Attorneys,* No. 99-0962 (Tex. 1999) (orig. proceeding) (unpublished order).

A contempt judgment is reviewable only via a petition for writ of habeas corpus (if the contemnor is confined) or a petition for writ of mandamus (if no confinement is involved). *See Long,* 984 S.W.2d at 625. Decisions in contempt proceedings cannot be reviewed on appeal because contempt orders are not appealable, even when appealed along with a judgment that is appealable. *Metzger v. Sebek,* 892 S.W.2d 20, 55 (Tex.App.-Houston [1st Dist.] 1994, writ denied), *cert. denied,* 516 U.S. 868 (1995); *see also Tex. Animal Health Comm'n v. Nunley,* 647 S.W.2d 951, 952 (Tex. 1983).

We denied the Cadles' and CACA's petitions for mandamus relief from the 1998 contempt judgment in 1999, and our plenary power over those original proceedings has long since expired. *See* Tex.R.App.P. 19.1. Thus, we are without jurisdiction to review either the Cadles' or CACA's complaints about the 1998 contempt judgment in this appeal.

The Cadles assert that we no longer have plenary power to change our October 5, 2000 judgment. Rule 19 provides that a court of appeals' plenary power over its judgment expires 30 days after the court overrules all timely filed motions for rehearing. *Id*. 19.1(b). We denied Lobingier's motion for rehearing on January 25, 2001, and he did not file his motion for en banc review until 29 days later, on February 23, 2001. The Cadles assert that our plenary jurisdiction expired on February 25, 2001. The San Antonio Court of Appeals has considered and rejected this argument. In *Yzaguirre v. Gonzalez,* 989 S.W.2d 111 (Tex.App.-San Antonio 1999, pet. denied), the court held that a motion for en banc reconsideration is a type of motion for rehearing for purposes of rule 19.1(b) that can be filed at
672 *672 any time during the appellate court's plenary period. *Id*. at 113; *see also* Tex.R.App.P. 49.7. As a result, the court concluded that a motion for en banc reconsideration filed within 30 days after the denial of a motion for rehearing was timely and that the court's plenary jurisdiction did not expire

until 30 days after it ruled on a timely filed motion for en banc reconsideration. *Yzaguirre,* 989 S.W.2d at 113. We agree with the San Antonio Court of Appeals. Because Lobingier's motion for en banc review was filed within 30 days after we denied his motion for rehearing, our plenary jurisdiction extends until 30 days after we rule on the en banc motion. Accordingly, we have jurisdiction to consider the motion.

The Cadles also contend that the 1998 contempt judgment is void and therefore subject to collateral attack via this direct appeal. A direct appeal is not a collateral attack, however. "A collateral attack on a judgment is an effort to avoid its binding force in a proceeding, instituted not for the purpose of correcting, modifying, or vacating it, but in order to obtain specific relief against which the judgment stands as a bar." *Boudreaux Civic Ass'n v. Cox,* 882 S.W.2d 543, 549 (Tex.App.-Houston [1st Dist.] 1994, no writ) (quoting *Texaco, Inc. v. LeFevre,* 610 S.W.2d 173, 176 (Tex.Civ.App.-Houston [1st Dist.] 1980, no writ)); *see also Simmons v. Compania Financiera Libano, S.A.,* 14 S.W.3d 338, 340 (Tex.App.-Houston [14th Dist.] 2000, pet. filed) ("A collateral attack is an attempt to avoid the effect of a judgment in a proceeding brought in a court of equal jurisdiction for some other purpose."). The Cadles and CACA's direct appeal of the 1998 contempt judgment was brought to correct, modify, or vacate the judgment, not to serve as a bar against it in an enforcement proceeding. Thus, the appeal was a direct attack on the contempt judgment, not a collateral attack. *See Glunz v. Hernandez,* 908 S.W.2d 253, 255 n. 3 (Tex.App.-San Antonio 1995, writ denied) (noting that direct attacks in the court of appeals include ordinary appeal, appeal by writ of error, and appeal by writ of error from bill of review judgment); *see also Austin Indep. Sch. Dist. v. Sierra Club,* 495 S.W.2d 878, 881 (Tex. 1973) (holding that direct attack may be brought in court rendering the judgment or in another court authorized to review judgment on appeal or by writ of error). Because the appeal from the 1998 contempt judgment is a direct attack on the judgment, and because we lack jurisdiction to review a contempt judgment via direct appeal, we are without authority to consider the Cadles' and CACA's complaints regarding the judgment.[10]

[10] We express no opinion about whether the Cadles and CACA can collaterally attack the 1998 contempt judgment if Lobingier seeks to enforce it.

The Cadles cite three cases that state a void judgment is subject to both direct and collateral attacks. *See Tex. Dep't of Transp. v. T. Brown Constructors, Inc.,* 947 S.W.2d 655, 659 (Tex.App.-Austin 1997, writ denied); *Lawrence Sys., Inc. v. Superior Feeders, Inc.,* 880 S.W.2d 203, 211 (Tex.App.-Amarillo 1994, writ denied); *Boyd v. Gillman Film Corp.,* 447 S.W.2d 759, 762-63 (Tex.Civ.App.-Dallas 1969, writ ref'd n.r.e.). In each of these cases, the courts simply acknowledged that a direct appeal was not the only way to attack a void judgment. *See Tex. Dep't of Transp.,* 997 S.W.2d at 659 (holding that appellant, who failed to file timely appeal from trial court's judgment and could not meet requirements of bill of review, could still collaterally attack void judgment); *Lawrence Sys.,* 880 S.W.2d at 211 (noting collateral attack rule as
673 dicta to holding *673 that enforcement of foreign judgment was barred by statute of limitations); *Boyd,* 447 S.W.2d at 762-63 (rejecting idea that void judgment could not be attacked by petition for writ of mandamus where it had not been attacked via direct appeal). It is important to note, however, that a direct appeal was at least initially available in each case. None of the cases involved the argument the Cadles make here, which is that, if a direct appeal is the improper method for attacking a trial court's ruling, the appeal can be treated as a collateral attack. We decline to apply the collateral attack rule to this situation.

VI. Request for "Release" from Contempt Fines

The Cadles assert they are entitled to be "released" from both the 1996 and 1998 contempt judgments because they have complied with the $300,000 judgment, the turnover orders, and all related matters. Because we lack jurisdiction over the appeal from the 1998 contempt judgment, we cannot consider this complaint as to that judgment. In addition, the confinement order against Daniel in the 1996 contempt judgment is a criminal contempt sanction.

Daniel cannot avoid this punitive sanction by his post-contempt satisfaction of the $300,000 judgment and other orders. *See Busby,* 921 S.W.2d at 391.

Further, the Cadles did not comply with the coercive portion of our contempt judgment until January 11, 1999, when funds that Cadle had deposited in the registry of the federal district court were paid to Lobingier pursuant to a federal district court order.[11] Thus, 922 days elapsed during which the Cadles failed to comply with our July 1996 judgment (July 3, 1996 — January 11, 1999). Consequently, the Cadles are liable for $461,000 in civil contempt sanctions, payable to this court. The Cadles could have avoided these civil sanctions by complying with the turnover orders before the sanctions accrued but chose not to. Now that the sanctions have accrued, the Cadles must pay them. *See id.* (stating the contemnor can only avoid coercive sanctions by timely complying with contempt order).

[11] Immediately after the trial court signed the arrearage judgment, Cadle sought relief in the federal district court and paid over $400,000 into the federal court's registry. The federal district judge found that Cadle's federal lawsuit "was obviously contrived by [Cadle] to delay payment of sums due and owing to [Lobingier]" and dismissed it. In August 1998, the trial court ordered Cadle and Daniel to turn the funds in the federal court registry over to Lobingier, and, in December 1998, the federal court ordered those funds to be paid to Lobingier.

VII. Attorney's Fees

Cadle asserts the trial court erred by awarding Lobingier $5,000 in attorney's fees related to the 1998 turnover order Lobingier obtained concerning the funds Cadle had deposited in the federal court registry. Lobingier concedes that the fee award is improper. Accordingly, we sustain this issue.

VIII. Conclusion

We dismiss the Cadles' appeal of our 1996 contempt judgment and the trial court's 1998 contempt judgment. We reverse the trial court's arrearage judgment and render judgment that Lobingier cannot recover civil contempt sanctions from the Cadles. However, we render judgment that the Cadles are jointly and severally liable for the $461,000 civil contempt fine, payable to this court, due to their failure to comply with the civil contempt order in our 1996 contempt judgment for
674 922 days. It is ordered that $461,000 must *674 be paid into the registry of this court no later than 5:00 p.m. on July 12, 2001.

We reverse the $5,000 award of attorney's fees to Lobingier and render judgment that Lobingier take nothing on his attorney's fees claim.

Cadle, Daniel, and CACA are jointly and severally liable for the costs incurred in this appeal, for which let execution issue.

HOLMAN and WALKER, JJ., Recused.

No. 95-0398
Supreme Court of Texas

Cathey v. Booth

900 S.W.2d 339 (Tex. 1995) · 38 Tex. Sup. Ct. J. 927
Decided Jun 22, 1995

No. 95-0398.

June 22, 1995.

Appeal from the 294th District Court, Wood
340 County, Tommy Wallace, J. *340

Michael E. Starr, Douglas R. McSwane, Jr., Tyler, Monte F. James, and J. Kevin Oncken, Austin, for petitioners.

David B. Griffith and Robert D. Bennett, Gilmer, for respondents.

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

PER CURIAM.

The Texas Tort Claims Act requires a claimant to provide a governmental unit with formal, written notice of a claim against it within six months of the incident giving rise to the claim; however, the formal notice requirements do not apply if the governmental unit has actual notice of the claim. TEX.CIV.PRAC. REM. CODE § 101.101. In this cause, we consider whether a hospital may receive actual notice of a claim against it from its own medical records. We conclude that, for a hospital to have actual notice, it must have knowledge of (1) a death or injury; (2) its alleged fault producing or contributing to the death or injury; and (3) the identity of the parties involved. Because the records at issue in this case do not convey to the hospital its possible culpability, we reverse the judgment of the court of appeals as to any remaining claims against Wood County Central Hospital and render judgment that the Booths take nothing from the Hospital.

Glenda Booth was admitted to Wood County Central Hospital with labor pains on August 1, 1990, following a course of prenatal care by Dr. George Cathey. Glenda and Jerry Booth's child was delivered stillborn on that day.

The Booths sued Dr. Cathey and the Hospital, alleging that their negligence resulted in the stillbirth of the Booths' child and in physical pain and mental anguish to the Booths. The Booths
341 allege that the doctor *341 and the Hospital were negligent in failing to diagnose and treat Glenda Booth's condition as a high risk pregnancy and in failing to diagnose and treat Glenda Booth for gestational diabetes.

The trial court granted summary judgment in favor of Dr. Cathey and the Hospital on all claims. The court of appeals affirmed as to the Booths' claims for the mental anguish that they suffered as a result of the negligent treatment of the fetus. Otherwise, the court of appeals reversed and remanded for a new trial. 893 S.W.2d 715, 720.

To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c). A defendant who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action or who conclusively establishes all of the elements

of an affirmative defense is entitled to summary judgment. *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). In reviewing a summary judgment, we must accept as true evidence in favor of the nonmovant, indulging every reasonable inference and resolving all doubts in the nonmovant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

Section 101.101(c) of the Tort Claims Act provides that the formal notice requirements of section 101.101(a) "do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." TEX.CIV.PRAC. REM. CODE § 101.101(c). It is undisputed that the Booths failed to provide the Hospital with formal, written notice of their claims against it pursuant to section 101.101(a). The Booths assert, however, that the Hospital received actual notice of their claims. The Booths argue that section 101.101(c) requires only that a governmental unit have knowledge that a death, an injury, or property damage has occurred. We disagree.

The purpose of the notice requirement is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial. *See City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981). The interpretation of section 101.101(c) urged by the Booths would eviscerate the purpose of the statute, as it would impute actual notice to a hospital from the knowledge that a patient received treatment at its facility or died after receiving treatment. For a hospital, such an interpretation would be the equivalent of having no notice requirement at all because the hospital would be required to investigate the standard of care provided to each and every patient that received treatment.

We hold that actual notice to a governmental unit requires knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved. Our holding preserves the purpose of the notice statute, and is consistent with the holdings of the majority of the courts of appeals. *See Parrish v. Brooks*, 856 S.W.2d 522, 525 (Tex.App.-Texarkana 1993, writ denied); *Bourne v. Nueces County Hosp. Dist.*, 749 S.W.2d 630, 632-33 (Tex.App. — Corpus Christi 1988, writ denied); *Tarrant County Hosp. Dist. v. Ray*, 712 S.W.2d 271, 274 (Tex.App.-Fort Worth 1986, writ ref'd n.r.e.). To the extent that *Texas Dep't of Mental Health Mental Retardation v. Petty*, 817 S.W.2d 707, 717 (Tex.App.-Austin 1991), *aff'd on other grounds*, 848 S.W.2d 680 (Tex. 1992), is inconsistent with this opinion, we disapprove it.

As summary judgment proof, Wood County Central Hospital presented the affidavit of its administrator, Marion Stanberry, who stated that prior to its receipt of a letter dated July 7, 1992, the Hospital had no knowledge of any alleged injuries of Glenda or Jerry Booth or of any alleged fault of the Hospital with respect to such injuries.

The summary judgment evidence provided by the Booths does not raise a fact issue that Wood County Central Hospital had actual notice of any alleged culpability on its part producing or contributing to any injury to Glenda or Jerry
342 Booth. The only evidence *342 presented by the Booths concerning the Hospital's knowledge of its culpability is an affidavit from Dean Cromartie, an obstetrician who reviewed Glenda Booth's medical records and determined that Dr. Cathey and the Hospital were negligent in their treatment of Glenda Booth. Dr. Cromartie explained that the Cesarean section was not performed on Glenda Booth until more than half an hour after the time that it was called for. Even if the Hospital was aware of the information in its medical records relied upon by Dr. Cromartie in forming his

opinion, we hold that, as a matter of law, this information failed to adequately convey to the Hospital its possible culpability for mental and physical injuries to Glenda and Jerry Booth. *Cf. Dinh v. Harris County Hosp. Dist.*, 896 S.W.2d 248, 252-53 (Tex.App.-Houston [1st Dist.] 1995, writ dism'd w.o.j.).

Wood County Central Hospital and Dr. Cathey also argue that the judgment of the court of appeals should be reversed because the Booths failed to plead a cause of action for damages independent of the stillbirth. The Booths' pleadings contain allegations that Dr. Cathey and the Hospital were negligent in their treatment of Glenda Booth and allegations that such treatment resulted in physical and mental injuries to Glenda and Jerry Booth. A mother "may recover mental anguish damages suffered as a result of her injury which was proximately caused by [a doctor's or a hospital's negligence] and which includes the loss of her fetus." *Krishnan v. Sepulveda*, ___ S.W.2d ___, ___ [1995 WL 358844] (Tex. 1995).[1] However, a father may not recover mental anguish damages from either the treating physician or the hospital because neither owes a duty to him. *Id.* at ___.

[1] Neither parent, however, may recover damages for the loss of society, companionship, and affection suffered as a result of the loss of a fetus. *Krishnan*, ___ S.W.2d at ___.

Accordingly, a majority of the Court grants the applications for writ of error, and, without hearing oral argument, affirms in part and reverses in part the judgment of the court of appeals. TEX.R.APP.P. 170. The Court renders judgment that the Booths take nothing from Wood County Central Hospital and that Jerry Booth take nothing from Dr. George Cathey. With regard to the claims asserted by Glenda Booth against Dr. George Cathey, the Court affirms the judgment of the court of appeals, which remanded those claims for trial.

No. 04-95-00392-CV
Court of Appeals of Texas, San Antonio

Chale Garza Inv. v. Madaria

931 S.W.2d 597 (Tex. App. 1996)
Decided Jul 19, 1996

No. 04-95-00392-CV.

April 30, 1996. Rehearing Overruled July 19, 1996.

Appeal from the 341st District Court, Webb
598 County, Elma Teresa Salinas Ender, J. *598

Roger C. Rocha, Laredo, for appellants.

Alberto Alarcon, Hall, Quintanilla Alarcon, Laredo, Clay A. Cornett, Barrett Burke Wilson Castle Daffin Frappier, Houston, for appellees.

Before RICKHOFF, HARDBERGER and DUNCAN, JJ.

OPINION

RICKHOFF, Justice.

This appeal arises out of a wrongful foreclosure action. Summary judgment was granted in favor of
599 appellees Alberto Cabezut *599

Madaria and Arturo Cabezut Madaria (the "Madarias"). In four points of error, appellants challenge the summary judgment contending: (1) the summary judgment was improperly based on an agreement to which appellants did not consent; (2) the summary judgment was improperly based on an agreement consented to by appellee Berkeley Federal Bank Trust, F.S.B. f/k/a First State Savings Bank (Of Delaware) (hereinafter "Berkeley Federal"), who was without authority to adversely affect appellants by consenting to the agreement; and (3) the summary judgment was improper as to appellants because they were not named in the motion and the summary judgment did not address their counterclaims. We affirm.

FACTS

The Madarias' father purchased the property at issue in 1979, assuming the then existing indebtedness in favor of Laredo Savings and Loan Association ("Laredo Savings") with its consent. The Madarias' father died on June 4, 1984, and the Madarias inherited the property from him. On December 10, 1984, Laredo Savings exercised its right to accelerate the note on the property. Berkeley Federal is a successor-in-interest to Laredo Savings. On May 21, 1993, Berkeley Federal sent notice of default of the previously accelerated note. On February 7, 1994, Berkeley Federal sent notice of acceleration and foreclosure sale. On March 1, 1994, Berkeley Federal sold the property at foreclosure to the appellants.

The Madarias filed suit to set aside the foreclosure alleging various claims including that the sale was barred by the statute of limitations. Berkeley Federal filed a motion for summary judgment alleging there was no genuine issue of material fact as to any of the Madarias' allegations. The Madarias filed a counter motion for summary judgment claiming, in pertinent part, that the statute of limitations barred the foreclosure, having run four years from December 10, 1988, the date the note was initially accelerated by Laredo Savings. Berkeley Federal filed a response contending the statute of limitations was extended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").

Ultimately, Berkeley Federal was forced to admit FIRREA did not resurrect its claim against the Madarias and withdrew its opposition to the summary judgment on the basis of the statute of limitations. In exchange for withdrawing its opposition, the Madarias paid Berkeley Federal the sum of $20,000 ($15,000 was for the amount of the indebtedness still owed by the Madarias on the note prior to foreclosure) and agreed that the relief prayed in connection with all issues other than the statute of limitations issue would be denied. This agreement by Berkeley Federal to withdraw its opposition as to the statute of limitations issue in exchange for the consideration of $20,000 is the agreement to which appellants refer in their points of error.

The agreement between the Madarias and Berkeley Federal was presented to the trial court at a hearing on January 31, 1995. The motions for summary judgment were previously taken under advisement without the necessity of an oral hearing. Appellants never filed a response to the Madarias' motion.

ARGUMENTS ON APPEAL

In four points of error, appellants challenge the summary judgment contending: (1) the summary judgment was improperly based on an agreement to which appellants did not consent; (2) the summary judgment was improperly based on an agreement consented to by appellee Berkeley Federal, who was without authority to adversely affect appellants by consenting to the agreement; and (3) the summary judgment was improper as to appellants because they were not named in the motion and the summary judgment did not address their counterclaims.

1. Agreement between Madarias and Berkeley Federal

In their first and second points of error, appellants contend the summary judgment was improper because it was based on the agreement previously mentioned. Appellants argue the agreement was an improper basis for the summary judgment because they were not parties to the agreement. Appellants also argue the agreement was an
600 improper basis for the summary judgment *600 because Berkeley Federal was without authority to adversely affect appellants' interests by entering into the agreement.

Appellants' arguments relating to the agreement between the Madarias and Berkeley Federal ignore the trial court's Findings of Fact and Conclusions of Law. The trial court held as a matter of law that the foreclosure sale was barred by the statute of limitations regardless of the agreement. Since appellants do not appeal the trial court's legal conclusion, their first two points of error are overruled.

2. Failure to Name Madarias or Address Counterclaims

In their third and fourth points of error, appellants contend the summary judgment was improper because they were not named in the motion and the summary judgment did not address their counterclaims.[1]

[1] Although appellants' fourth point of error erroneously refers to a summary judgment granted in favor of Berkeley Federal, the cases cited by appellants and the arguments made thereunder relate to the finality of a summary judgment which fails to address all claims or counterclaims.

The motion filed by the Madarias did not specifically name either Berkeley Federal or the appellants; however, the motion sought to have the foreclosure set aside. Both Berkeley Federal and the appellants were served with a copy of the motion. If appellants' argument is accepted, the order of the trial court would be invalid as to Berkeley Federal as well as to appellants simply because the motion did not set forth their names in an introductory paragraph similar to the forms cited by appellants. This result was apparently rejected by the trial court, since the order correctly notes that the effect of setting aside the foreclosure is to divest the appellants of any title or claim to

the property. *See Durkay v. Madco Oil Co.,* 862 S.W.2d 14, 17 (Tex.App.— Corpus Christi 1993, writ denied); *Diversified, Inc. v. Walker,* 702 S.W.2d 717, 721 (Tex.App.— Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Henke v. First Southern Properties, Inc.,* 586 S.W.2d 617, 620 (Tex.App. — Waco 1979, writ ref'd n.r.e.). Appellants should have known that such a result would follow, or if they were confused as to who the motion was filed against, they should have either filed a written response or raised the issue at the hearing. Appellants will not be permitted to raise this issue for the first time on appeal. *See City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671, 678-79 (Tex. 1979).

We must next consider whether the summary judgment properly disposed of appellants' counterclaims. Appellants contend that the counterclaims could not properly be denied because the Madarias' motion did not seek that relief. Appellants' contention once again ignores, however, the effect of the relief the Madarias sought.

The Madarias requested the court to grant them a summary judgment setting aside the foreclosure. When a foreclosure sale is void, the purchaser does not acquire title to the property. *See Durkay v. Madco Oil Co.,* 862 S.W.2d at 17; *Diversified, Inc. v. Walker,* 702 S.W.2d at 721; *Henke v. First Southern Properties, Inc.,* 586 S.W.2d at 620. Appellants' first counterclaim contends the Madarias were tenants at will and, therefore, owed the appellants rent. A tenant at will is one who holds possession of a premises by permission of an owner, but without a fixed term. *Fandey v. Lee,* 880 S.W.2d 164, 169 (Tex.App.— El Paso 1994, writ denied) (citing Black's Law Dictionary). Since the foreclosure sale was declared void, appellants did not acquire title to the property as a matter of law. Therefore, the Madarias, as owners, could not be tenants at will, and the appellants were not owners entitled to rental.

Appellants second counterclaim seeks recovery of damages for tortious interference with an earnest money contract to sell the property. Specifically, appellants complain of the Madarias' filing of the instant suit and the filing of a Notice of Lis Pendens. A lis pendens is absolutely privileged in an action for tortious interference of contract and does not constitute interference as a matter of law. *Griffin v. Rowden,* 702 S.W.2d 692, 695 (Tex.App. — Dallas 1985, writ ref'd n.r.e.); *see also Bayou*
601 *Terrace Inv.* *601 *Corp. v. Lyles,* 881 S.W.2d 810, 818 (Tex.App.— Houston [1st Dist.] 1994, no writ). Therefore, the Madarias were privileged as a matter of law in exercising their legal right as owner of the property by filing the instant suit and the lis pendens. Moreover, it would be illogical to accept that the Madarias could not prevent appellants from selling the Madarias' property — property to which appellants did not have title and were without right or authority to sell.

Even if we were to accept that the trial court erred in disposing of appellants' counterclaims on the face of the Madarias' motion, it would be meaningless for this court to reverse the judgment as to the counterclaims since appellants could not recover thereon as a matter of law. *See Bieganowski v. El Paso Medical Center Joint Venture,* 848 S.W.2d 361, 362 (Tex.App.— El Paso 1993, writ denied).

Appellants' third and fourth points of error are overruled.

CONCLUSION

The judgment of the trial court is affirmed.

No. 14-05-01254-CV
Court of Appeals of Texas, Fourteenth District, Houston

Concerned v. Houston

209 S.W.3d 666 (Tex. App. 2006)
Decided Dec 21, 2006

No. 14-05-01254-CV.

September 26, 2006. Rehearing Overruled December 21, 2006.

Appeal from The 281st District Court, Harris
667 County, David J. Bernal, J. *667

David H. Melasky, Houston, for appellant.

Michael A. Stafford and Elizabeth Pool Stevens, for City of Houston.

Alvin Lee Freeman, Elizabeth Pool Stevens,
669 Michael A. Stafford, Houston, for appellees. *669

Panel consists of Justices HUDSON, FOWLER, and SEYMORE.

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OPINION

J. HARVEY HUDSON, Justice.

Concerned Community Involved Development, Inc. ("CCID") sought a temporary and permanent injunction against the City of Houston ("the City"), Candlelight Development Joint Venture, and various other real estate development and construction entities (referred to collectively as "Candlelight") to prevent the construction of a bridge. The City filed a plea to the jurisdiction. The trial court conducted separate hearings on (1) CCID's request for injunctive relief and (2) the City's plea to the jurisdiction. In a single order, the trial court denied CCID's request for injunctive relief and granted the City's plea to the jurisdiction. In two points of error, CCID contends the; trial court erred in (1) overruling its due process claims by denying injunctive relief and (2) granting the City's plea to the jurisdiction. We affirm, in part, and reverse and remand, in part.

BACKGROUND FACTS

Candlelight Estates is a residential subdivision in Houston's northwest quadrant. The northern boundary of sections 1 and 2 of the subdivision is marked by a Harris County Flood Control District (the "District") drainage ditch. Rosslyn Road runs through northwest Houston in a generally north-south direction, but for want of a bridge, there is no through traffic across the drainage ditch. Accordingly, the road dead ends on both sides of the ditch.

Candlelight sought to facilitate the development of its property north of the ditch by constructing a bridge across the drainage ditch on Rosslyn Road. Candlelight sought approval from the District, and, in 2001, the District approved Candlelight's request to construct a bridge across the ditch. *City of Houston v. Grudziecke*, No. 14-02-00947-CV, 2003 WL 1922671, at *1 (Tex.App.-Houston [14th Dist.] Apr. 24, 2003, no pet.) (mem.op.). However, the proposed construction provoked opposition from citizens living in sections 1 and 2 of Candlelight Estates. Nevertheless, the City of Houston issued a permit for construction of the bridge. *Id.* Homeowners in the area sought an injunction in the 157th District Court against the City, Candlelight, and others to prohibit the construction of the bridge, contending that such construction constituted trespass and nuisance,

violated section 11.086 of the Texas Water Code, and was an unconstitutional taking of their property. *Id.*

The City filed a plea to the jurisdiction contending the district court lacked subject matter jurisdiction because the homeowners did not suffer a taking under the Texas Constitution and, thus, suffered no injury. *Id.* at *4. We held the trial court had no subject matter jurisdiction because claims of inverse condemnation must be filed in the county court. *Id.* at *5. For reasons that are not entirely clear in our record, Candlelight subsequently abandoned its plan to build the bridge as designed. The original plan called for the bridge to be built on box culverts. Thereafter, Candlelight sought to build a "span" bridge across ditch, apparently necessitating an application for a new permit.

In March 2004, Candlelight submitted to the City its plans to construct paving and drainage facilities in conjunction with the installation of the Rossyln Road bridge. On October 11, 2005, the City's Department of Public Works and Engineering once again approved a permit authorizing Candlelight to construct a bridge across the ditch. Shortly thereafter, CCID, a non-profit corporation organized to protect the homes and properties of
670 landowners in *670 the vicinity of the proposed bridge, filed an application for injunctive relief in the 281st District Court. CCID alleged the permit issued by the City is void because it was based on "secret proceedings" that violated CCID members' rights to (1) federal due process under the federal constitution; (2) due course of law under the state constitution; (3) the Open Meetings Act; and (4) the Public Information Act. CCID also sought injunctive relief under section 1983 of the United States Code, chapter 42.[1]

[1] CCID also sought, under the Texas Uniform Declaratory Judgments Act, an order declaring that the City was violating public rights conferred by the state and federal constitutions.

The City again filed a plea to the jurisdiction alleging CCID lacked standing to bring its claims, that CCID is essentially making another inverse condemnation claim, and that its statutory claims lack merit. After a hearing, the trial court (1) denied CCID's request for injunctive relief and (2) granted the City's plea to the jurisdiction. Because the determination of jurisdiction is our first duty, we will address appellant's points in reverse order.

PLEA TO THE JURISDICTION

In its plea to the jurisdiction, the City alleged it was apparent from the pleadings that CCID lacked standing to sue.[2] For reasons other than those espoused by Candlelight in its plea to the jurisdiction, we find CCID lacks standing to sue.[3]

[2] The City also argued that — to the extent CCID asserted a takings claim — the district court lacks jurisdiction; CCID's argument it has a due process right to participate in the City's permitting process is "baseless "; CCID has not stated valid open records or meetings claims to confer jurisdiction; CCID sought a declaratory judgment solely to recover attorney's fees; and CCID lacks standing because particularized, individual proof of money damages for any alleged negative impact on property values is necessary.

[3] The City contends CCID lacks standing and cites the test for associational standing. However, the record reveals that CCID received assignments from various property owners in the vicinity of the proposed Rosslyn Road bridge, and it brings this action in its own capacity, based upon those assignments. Because we find CCID lacks standing on grounds not argued by the City, we use the standard of review mandated when appellate courts review standing sua sponte.

The doctrine of standing identifies suits appropriate for judicial determination. *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). "The general test for standing in Texas requires that

there' (a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.'" *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993) (quoting *Bd. of Water Engineers v. City of San Antonio*, 155 Tex. Ill, 114, 283 S.W.2d 722, 724 (1955)). Unless standing is conferred by statute, a plaintiff must demonstrate that he "possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury." *Williams v. Lara*, 52 S.W.3d 171, 178-79 (Tex. 2001); *see also Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) (stating that standing consists of some interest peculiar to person as individual and not as member of general public). It is the plaintiffs burden to allege facts affirmatively demonstrating the trial court's jurisdiction to hear the case. *Tex. Ass'n of Bus.*, 852 S.W.2d at 445-46. Standing is a question of law subject to de novo review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). As a component of subject matter jurisdiction, standing is never presumed and cannot be waived. *Tex. Ass'n of Bus.*, 852 S.W.2d at 443-4. We apply *671 the same standard of review to determine standing as we do to determine subject matter jurisdiction generally. *Id.* at 446. Here, we construe the petition in favor of CCID and review the entire record to determine whether any evidence supports standing. *Id.*

CCID is a Texas non-profit corporation and its president, David Eng, lives on Rosslyn Road. The record contains ten documents assigning to CCID:

> all causes of action which are, or may be, necessary to prevent, or recover compensation for, damage to [the homeowner's property] occasioned by reason of the actual or possible construction of the proposed bridge in the 4400 to 4600 block of Rosslyn Road, and the associated modifications of Rosslyn Road.

The assignments were executed by property owners who live "from directly on the 4400 block of Rosslyn Road, [David Eng] and those neighbors, as well as to the intersection of Bethlehem and Rosslyn and to even flanking streets."[4]

> [4] Taken from the testimony of David Eng at the hearing on CCID's motion for temporary injunction.

The City argues the trial court has no subject matter jurisdiction because CCID's real claim is an unconstitutional "taking" of property which must be heard in the county civil court at law. CCID strenuously denies this assertion, stating it seeks no damages or compensation for the alleged violation of its members' rights as property owners. However, CCID's petition speaks in terms of protecting "property interests," the "deprivation of homeowner rights," "irreparable harm to the properties," "affecting the property values of the homes in the vicinity," and preventing "permanent adverse consequences to the property owners." CCID concedes that property owners in the vicinity of the proposed bridge will suffer no *compensable* injury by its construction. However, CCID claims it was entitled to injunctive relief because (1) property rights will be adversely affected by construction of the bridge, (2) property owners were irreparably harmed by the City's denial of due process, and (3) property owners have no adequate remedy at law.

Rights, constitutional and otherwise, do not exist in a vacuum. *Wilson v. Taylor*, 658 F.2d 1021, 1032 (5th Cir.1981). The Due Process Clause is only activated when there is some substantial liberty or property interest which is deserving of procedural protections. *Roane v. Callisburg Indep. Sch. Dist.*, 511 F.2d 633, 637 (5th Cir.1975). By its terms, the Due Process Clause safeguards "life, liberty, or property." *Id.* at 637-38. To have a property interest, a person must have more than an abstract need or desire for it. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct.

2701, 33 L.Ed.2d 548 (1972). Further, he must have more than a unilateral expectation of it. *Id.* He must, instead, have a legitimate claim of entitlement to it. *Id.*

CCID offered evidence that property values on Rosslyn Road will be diminished by construction of the bridge. CCID also offered testimony that property owners will be inconvenienced by the bridge and might have to take a circuitous route in and out of their respective driveways. Finally, CCID offered evidence that the approach to the bridge will be unsafe because the lanes narrow too quickly.

All enhancements, whether public or private, are rarely achieved without some inconvenience. If the public authorities could never build, repair,
672 enhance, *672 or alter a street or highway without consulting all "affected" property owners, permitting them to alter the design of the project, or paying all persons along such thoroughfares for the inconvenience and disruption occasioned by the construction, no public improvements would ever be made. Streets and highways are primarily for the benefit of the traveling public, and only incidentally for the benefit of property owners along its way. *State Highway Comm'n v. Humphreys*, 58 S.W.2d 144, 145 (Tex.Civ.App.-San Antonio 1933, writ ref'd). Thus, a landowner suffers no compensable injury where the government has not physically appropriated, denied access to, or otherwise directly restricted the use of the landowner's property. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 450 (Tex. 1992).

Here, there is no evidence that the bridge will be constructed on the land of any private person; that any property owner will be denied access to his property; or that any property owner will be restricted in the use of his property. It may well be that property owners along Rosslyn Road will suffer a diminution in the value of their property due to increased traffic, noise, et cetera. However, it is well established that "`The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgment of the public authorities.'" *Humphreys*, 58 S.W.2d at 145 (*quoting Heller v. Atchison, T. S.F.R. Co.*, 28 Kan. 625 (1882)). Thus, recovery is not permitted if the injury is one suffered by the community in general. *Felts v. Harris County*, 915 S.W.2d 482, 484 (Tex. 1996). Community injuries include highway traffic noise, dust, traffic hazards, and circuitous routes; injuries such as these are not compensable. *Id.* at 485. Periodic street improvements are simply an incident of city life and must be endured. The law gives the adjacent property owner no right to relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made. *L-M-S Inc. v. Blackwell*, 149 Tex. 348, 233 S.W.2d 286, 289 (1950).

CCID concedes that the property owners have no compensable damages, but nevertheless insists that because some ephemeral, non-compensable, previously unrecognized property interest will be "affected" by the construction, state and federal due process protections come into play, and an injunction is necessary.

We are unaware of any cognizable property interest that might be impacted by the City other than an unconstitutional taking of property prohibited by article I, section 17 of the Texas Constitution. CCID has consistently denied that its claim is a takings claim.[5] Therefore, CCID has failed to show any particular injury on which to sue. After fully reviewing the record, and after construing the petition in favor of CCID, we find CCID lacks standing to sue. We overrule CCID's second point of error in part, to the extent it is based on federal and state due process and any related attempt to obtain a declaratory judgment or injunctive relief for want of subject matter jurisdiction. Because a claim (a) shall be a real
673 *673 controversy between the parties, which (b) will be actually determined by the judicial

declaration sought, we find CCID lacks standing to bring a claim for injunctive relief. Accordingly, we overrule CCID's second issue on appeal.

[5] We agree with the City's contention that, notwithstanding CCID's elaborate attempt to circumvent the exclusive jurisdiction of the county court, this suit is, in reality, based upon a disguised claim of inverse condemnation. Exclusive jurisdiction in inverse condemnation claims is vested with the Harris County Civil Courts at Law, pursuant to section 25.1032(c) of the Government Code. *Kerr v. Harris County*, 177 S.W.3d 290, 294 (Tex.App.-Houston [1st Dist.] 2005, no pet.).

OPEN MEETINGS AND PUBLIC INFORMATION ACTS

CCID also petitioned the trial court for relief under the Texas Open Meetings and Public Information Acts. *See* TEX. GOV'T CODE ANN. § 551.002 (Vernon 2004) (requiring every regular, special, or called meeting of a governmental body to be open to the public); TEX. GOV'T CODE ANN. § 552.001 (Vernon 2004) (stating public policy mandates that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees."). Each of these statutes confers standing to CCID. *See id.* at § 552.001 (giving "each person" the right to complete information about most governmental affairs); *Burks v. Yarbrough*, 157 S.W.3d 876, 880 (Tex.App.-Houston [14th Dist.] 2005, no pet.) (interpreting the Open Meetings Act broadly to confer standing on any member of the interested public).

In one order, and without stating its reasoning, the trial court granted the City's plea to the jurisdiction and denied CCID's request for injunctive relief.

Whether a plaintiff has alleged facts affirmatively demonstrating a trial court's subject matter jurisdiction is a question of law we review de novo. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). We construe the pleadings liberally in favor of the plaintiffs, looking to their intent. *Lacy v. Bassett*, 132 S.W.3d 119, 122 (Tex.App.-Houston [14th Dist.] 2004, no pet.). If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction, but also do not affirmatively demonstrate incurable defects in jurisdiction, the plaintiff should be allowed an opportunity to amend. *Id.* A plea to the jurisdiction may be granted without allowing any opportunity to amend if the pleadings affirmatively negate the existence of jurisdiction. *Id.* To prevail, the defense must show that, even if all allegations in plaintiff's pleadings are true, there remains an incurable jurisdictional defect on the face of the pleadings that deprives the trial court of subject matter jurisdiction. *Brenham Hous. Auth. v. Davies*, 158 S.W.3d 53, 56 (Tex.App.-Houston [14th Dist.] 2005, no pet.).

In its plea to the jurisdiction, the City argued that CCID did not make valid open records or open meetings claims to confer jurisdiction. Regarding the open meetings claim, the City argued its permitting process does not involve a "governmental body" as defined by the Act. This argument attacks CCID's right of recovery under the statute and should have more properly been made in a motion for summary judgment; it does not attack the trial court's subject matter jurisdiction. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76-77 (Tex. 2000) (quoting 21 C.J.S. *Courts* § 16 at 23 (1990)) ("`The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.'"). Regarding the open records claim, the City argued CCID did not allege it had submitted a written request for information, that it lacks standing because CCID was not a "requestor" as defined by the Act, or that the appropriate remedy is an action for

mandamus. The failure to comply in all respects with statutory requirements may defeat a
674 claimant's *674 right to relief but, again, it does not deprive the trial court of subject matter jurisdiction. *Id.* We make no judgment regarding the merits of these claims or their likely success if and when they are presented in a motion for summary judgment. However, it was error to dispose of CCID's Open Meetings Act and Public Information Act claims in a plea to the jurisdiction. Appellant's first issue for review is sustained.

Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings in accordance with this opinion.

No. 8275
Court of Civil Appeals of Texas, San Antonio

Friedrich v. Seligmann

22 S.W.2d 749 (Tex. Civ. App. 1929)
Decided Dec 21, 1929

No. 8275.

November 20, 1929. Rehearing Denied December 21, 1929.

Appeal from District Court, Bexar County; Robt. W. B. Terrell, Judge.

Suit by Albert Friedrich against Julius Seligmann and others, in which Mrs. Emilie H. Friedrich, executrix of Albert Friedrich, deceased, was substituted as plaintiff. Judgment for defendants, and plaintiff appeals. Reversed and rendered.

Templeton, Brooks, Napier Brown, of San Antonio, for appellant.

Birkhead, Lang Beckmann and Harold K. Stanard, all of San Antonio, for appellees. *750

FLY, C.J.

This suit was instituted by Albert Friedrich against Julius Seligmann, Joseph Rubin, and Joseph Freeman, to recover earnest money in the sum of $5,000, which had been deposited by him on a contract of sale between the parties, in connection with three lots of land in the city of San Antonio. The court, after hearing the testimony, instructed a verdict for appellees. Pending the suit Albert Friedrich died and his executrix was made a party.

The facts show on April 28, 1926, a contract for the sale of three lots in San Antonio, for the sum of $57,500, of which $22,500 was to be paid in cash, the earnest money of $5,000 to be considered as part of the cash contracted for. The lots were described in the contract as lots 1, 2, and 3, in block 19, city block 976, on the west side of Broadway, formerly River avenue; lot No. 1 being described as a corner lot on the north side of Grayson street. The dates of payment of the balance remaining after payment of the cash were fixed, and the notes to be executed for each lot described. It is provided in the contract: "The said owners are to furnish to said Friedrich complete abstracts of title brought down to date, and said Friedrich shall have 15 clear days from April 29, 1926, in which to have his attorneys T. T. VanderHoeven and B. A. Greathouse, or either of them, to pass on said abstracts of title. If the title to said three lots of land is a merchantable title, then said Friedrich shall pay to said owners the cash consideration of $922,500.00, of which amount, however, said Friedrich has paid to said owners upon the execution and delivery of this contract of sale $5,000.00 in money, and therefore he is to pay the balance of $17,500.00 when the title to said lots is pronounced merchantable by his attorneys and the deal is closed. If the title to the property is merchantable and said Friedrich refuses to consummate the deal, then he shall forfeit said $5,000.00 cash payment as liquidated damages; but if said title to said three lots of land is not merchantable and is rejected by his said attorneys, then the said owners shall refund to said Friedrich the aforesaid $5,000.00 cash payment now made to bind said sale."

It was provided that each lot should be incumbered with no purchase money except that specified as being held against said lot, and further: "It is understood and agreed that said Friedrich has bought all three of said lots and unless the title to all three of said lots proves good

and merchantable, then the said Friedrich shall not be required to accept any one of the three lots to which the title may be merchantable." The final clause of the contract provides: "It is further understood and agreed that the attorneys of said Friedrich shall point any and all defects they might find in said title in order to enable the owners to correct the same, which defects shall be corrected by said owners within thirty days from receipt of the opinion of said attorneys, and the failure to make such corrections shall avoid this contract of sale and said $5,000.00 earnest money shall be refunded to said Friedrich."

It is clearly indicated in the contract that the abstract of title was to show a good, merchantable title to each of the three lots, that is, a title fairly deducible from the record, and, being contracted for on an abstract of title, the purchaser was under no obligation to go outside of the abstract furnished him by his vendor, but should rest upon the abstract alone without reference to any extraneous matters. Maupin, Marketable Title of Real Estate, § 6, pp. 23, 24 and 25. As said by this court, through Judge Neill, in Bowles v. Umberson, 101 S.W. 842, 844, in discussing the use and scope of an abstract of title: "By or through what means is the title to be `found good'? Clearly by means of the `abstract of title to be furnished in ample time for the party of the second part to have the same examined within 30 days from the date of the agreement.'"

It is the rule that the vendor cannot resort to parol evidence to remove doubts as to the title, if he is acting under a contract to furnish his vendee an abstract showing good, marketable title, but the abstract must be sufficient unto itself to show that the title is marketable. The rule above stated may be subject to the exception that under certain peculiar circumstances parol proof may be used to establish the identity of a vendor along the line of title, or to establish relationship and heirship. Such parol proof is permitted because it would be impossible to establish those matters except by parol. That is in effect held in the case of Hollifield v. Landrum, 31 Tex. Civ. App. 187, 71 S.W. 979, which is relied on by appellees. In that case a patent to land had been issued to Levi Hildebrandt and he went into possession. A deed to the land was made by O. L. Hildebrandt to Ward, and it was the contention of the intending purchaser, who rejected the title, that the vendor could not show by parol that Levi Hildebrandt was identical with O. L. Hildebrandt, which contention was properly overruled by the Court of Civil Appeals. There are expressions about a title by limitation not called for by the facts of the case, and consequently mere obiter dictum. No decision, or utterance by any author of law books has been cited, which has held or stated that if the deeds shown in the abstract fail to connect the vendors with the sovereignty of the soil such hiatus can be supplied by parol testimony.

In this case the abstract of title showed a grant of "suerte" No. 6, to Juan Martinez, and from Martinez to Antonio Rodriguez Baca. There was a deed to "a suerte of land and 12 hours of waters, bounded East by the Madre ditch; north by suerte of Mariano Salinas; west by the river; and south
751 *751 by Pascual Martinez." At the bottom of the instrument it is stated probably Alcalde Vicente Flores "did not sign because he did not know how." According to the abstract, about the year 1812, Antonio Baca was declared a rebel and his lands confiscated by the Spanish government, along with that of many other insurgents. On September 10, 1819, a list of confiscated properties was made by the authorities, from which the following extract is made: "Antonio Baca, 5 suerte which is rented for 6 bushels of corn." Some one, probably the person who prepared the abstract, has volunteered the hypothesis: "The probability is that the lands were restored to his widow, Maria Gertrudes de los Santos Coy, for she disposes of them by deed or will."

The will of Gertrudes de los Santos Coy declares that "she was first married to Antonio Rodriguez Baca (from which marriage there was no

succession)." She declares in said will that her property consists of "two suertes of land in the upper labor of the Alamo with 24 hours of water." The balance of the will in any manner affecting property is as follows:

"4th. Declares that in front of my house on the other bank of the _____ I have a piece of land bounded North and East by lands of Manuel Ximenes; and West and South by the River, which I leave to Ana Maria and her children.

"5th. Declare that I leave at the end of the labor de los Mochos a suerte of land with 12 hours of water for the benefit of my husband's, my mother's and my daughter's souls that with the annual interest thereof masses will be held, and if sold, the value thereof shall be left for masses of the aforesaid souls.

"6th. Declare that excepting 41 varas of land which I sold to Monjaras the balance left up to Alamo Bridge on the East and from same Street North to the River is mine.

"7th. Declare that on the other side of the Street which run to the Alamo Bridge and from in front of the land of Monjaras to where a hackberry tree stands above River dam I have sold to Pedro Salinas at $2.00 per vara of which sum I have only received $24.50.

"8th. Declare as my property the house in which I live, composed of three rooms and an adobe kitchen; of these rooms it is my will that the room and part of the rear building East with depth to the River, remain for the benefit of Ana Maria and her children.

"9th. Declare that 6 1/2 varas from corner of the room are mine and I leave it for the benefit of Maria Josefa Salazar.

"10th. Declare that my adopted son Pablo Baca and his wife Ma Josefa use the house in which they live for life or until he remarries (without selling it) or if she dies or remarries, said house shall remain for the benefit of Antonio.

"11th. Declare that I have a piece of land lying between the house of Pedro Monjaras and the land that I sold to Pedro Salinas.

"12th. Declare that jacal in which Ma. Antonio lives and land fronting on street to corner of the jacal with depth to the River, also the land on which stands the kitchen of Manuel Monjaras is mine. I leave it for the benefit of Ma. Antonia."

"17th. Declare that I leave as my only heir my grandson Jose Antonio Flores of all that is left after my will is complied with."

"19th. Declare that after my death it is my will that a Guardian be named for my grandson, Jose Antonio Flores, Refugio de la Garza shall appoint said Guardian."

The next in line in the abstract is a deed from Jose Antonio Flores, describing himself as heir of the maker of the will, conveying to Jose Antonio de la Garza "one suerte of land with 12 hours water situated in the labor of Valero and known by the name of Alamito. * * * Said suerte is bounded north by lands of purchaser; west by the river of this city; south by lands of Manuel Ximenes, and east by Madre ditch of said labor."

The next link in the title was two deeds dated December 5, 1847, conveying by Jose Antonio de la Garza to James L. Trueheart a tract of land in Bexar county, making a reference to a plat which does not aid the description. No reference is made in the deed to suerte 6, the only mention of a suerte being that the tract was bounded on the south "by a suerte of land belonging to the heirs of Manuel Ximenes and beginning at a post on the West bank of the Acequia Madre or main ditch, the upper corner of said suerte and about 3/4 of a mile above the Alamo Fort." James L. Trueheart, on December 4, 1871, conveyed to Robert Leslie 13 3/4 acres of land in San Antonio situated between the Alamo ditch and San Antonio river, bounded on the north by land of Leonardo Garza, on the east by Alamo ditch, on the south by land of John James, and on the west by a drain running

through irrigable lands and the land of the said Leonardo Garza. The land described was reconveyed to Trueheart by the executors of John Leslie, deceased, to pay the purchase money, on April 10, 1880. The property through different conveyances came to appellees. None of the conveyances mentioned suerte 6; the first and only time it was mentioned being in the grant from Spain. There were several maps or plats attached to the abstract after objections had been made by Mr. VanderHoeven. The one adopted by the city on February 19, 1878, does not indicate that the land was a part of suerte 6, although there are placed in it certain words and descriptions, which were admitted to be no part of the map, but which are calculated to mislead. There is nothing to show the location of suerte 6, except a plat or map made
752 by the Texas Title Company "from *752 data in recorded deeds, etc.," showing *approximate* location of original suerte lines of the Valero labors. There was no data given in the deeds upon which to base the location of suerte 6, "approximate" or otherwise.

There is no basis for a contention about limitation, for there is no proof that any one has ever been in possession of suerte 6, or lots 1, 2, and 3, for any statutory period, and while the grant of Spain may be hoary with age, possession under that grant is absolutely essential in order to perfect a title by limitation. If it be the law, as contended by appellees, that an abstract showing a title by limitations would have met the contract, it can be said that no abstract showing such title was ever tendered by appellees to Friedrich. In all the cases cited by appellees, possession always accompanies the assertion that a title can be perfected by time so as to meet the requirement of a marketable title. As said in 57 A.L.R. 1526, relied on by appellees: "But even where a title by adverse possession cannot be relied upon to comply with a contract to furnish a good or marketable title, it seems that lapse of time may be relied upon to cure defects in the vendor's title. Without holding that title by adverse possession had been established it has been held that defects in the vendor's title were not available to the vendee as an objection to performing the contract, where the vendor and his predecessors in title had been in undisturbed and undisputed possession of the subject-matter of the contract for a long period of time; at least, where it is made to appear that possession was held under a claim of title under the defective instrument, exclusive of all other rights." While that latitudinarian opinion in a number of its statements cannot be indorsed, still it gives no aid or comfort to the claim of appellees that time has perfected their title. Possession is made the basic matter in that opinion, and appellees have not shown possession.

It is asserted by appellees that "there is nothing to show that the grant of suerte 6 to Martinez did not include the lots in question." That can with propriety be said of any other Spanish grant in San Antonio. The trouble is that neither the grant nor the deeds, for over 50 years, in any way indicated that the lands conveyed were a part of suerte 6. A purchaser of land may voluntarily exercise faith in a title not traceable to the sovereignty of the soil and never shown to have been in adverse possession of any one, but the law cannot and will not endeavor to force said faith upon him under a contract requiring an abstract of title showing a good, marketable title. Friedrich could have shown a blind faith in the title, defective though it was, to the three lots; but he and his attorney had no such faith, and a court by its decree cannot supply that faith and simple trust.

In preference to the latitudinarian language used in quotations by appellees from several courts as to abstracts of title, which we deem not well supported by authority, we prefer the following language from the highly respected Court of Civil Appeals at Texarkana, in the case of Wright v. Glass, 174 S.W. 717, 718: "Contracting, as the parties did, for an abstract of the title to the land, and that it should be sent to an attorney of the purchaser for examination, comprehends the purpose of the parties that the abstract exhibited

should be subject to reasonable examination and approval by the purchaser. A provision that the abstract should be first sent to an attorney `for examination' would be meaningless unless construed as words intended to be appropriate to a condition that if after reasonable examination by the attorney the abstract exhibited failed to show a good title in the vendor, the purchaser was not then bound to consummate the purchase and should not forfeit his earnest money. There would be no necessity for an `abstract to the land' unless it was for the purpose of exhibiting a record title. As ordinarily used and understood `an abstract' is simply a compilation in abridged form of the record of the title. In this meaning of the term, as commonly understood, such construction of the contract should be adopted as would require an abstract showing a good record title. Anything less than this would not satisfy the term and carry out the implied intention of the parties. The terms used by the parties exclude, it is thought, any expectation on the part of the purchaser that there would be offered to him a title by limitation, depending, as it does, upon facts outside of and independent of the records. In the absence of adjudication in some way, a title by limitation is not settled. Had the abstract as exhibited been subject only to the objection that it was not free from incumbrance or cloud, it may have been, as contended by appellee that he had within the meaning of the contract tendered a marketable title. And appellee might have a title by limitation such as would constitute a good title in law, but the terms of the contract here do not include or contemplate such character of title." The contract in that case as to an abstract of title is not near so clear or so conclusive as to the abstract of title and the opinion of the attorney in this case.

By no fair deduction from the words of the contract can it be inferred that appellant would be forced into a trial on the question of limitations and to locate the land granted by the sovereign and to show appellees' connection with the grant, outside of the record and the abstract thereof. The provision as to submitting the abstract of title to the attorneys of appellant for examination and conditioning the obligation to take the land upon the opinion of the attorneys becomes meaningless and senseless, if in spite of that opinion, not
753 shown *753 to have been unreasonable, captious, or given with improper designs, appellant should be compelled to pay for the land or lose $5,000 earnest money. As said by Maupin, in his Marketable Titles (2d Ed.) pp. 725 and 726, § 288: "An agreement that the title shall be satisfactory to the purchaser's attorney will justify the purchaser in rescinding the contract if the attorney in good faith, and not capriciously, declare himself dissatisfied with the title." It was contracted that "complete abstracts of title brought down to date" should be furnished Friedrich, and that his attorneys T. T. VanderHoeven and B. A. Greathouse, or either of them, should have 15 days in which to consider them. The question of merchantable title was to be decided by them, and upon that decision, given in fairness and without injustice or caprice, the sale depended. It was in plain language made to depend on "when the title to said lots is pronounced merchantable by his attorneys and the deal is closed." The title to said land was "not merchantable and was rejected by his said attorneys," and it became the duty of appellees to return the $5,000. This under the plain terms of the contract between the parties. The abstract of title did not show a marketable title, and failed to connect appellees' title with the sovereignty of soil, and the amendments added nothing to the effectiveness of the original abstract of title.

The judgment is reversed, and judgment here rendered that appellant recover of appellees the sum of $5,000, with 6 per cent. interest thereon from July 19, 1926, time of filing of this suit, and for all costs of this and the lower court.

Reversed and rendered.

No. 03-0209
Supreme Court of Texas

Geodyne Energy Income v. Newton Corp.

161 S.W.3d 482 (Tex. 2005)
Decided Apr 8, 2005

No. 03-0209.

Argued September 9, 2004.

Decided April 8, 2005.

Appeal from the 298th Judicial District Court, 483 Dallas County, Adolph Canales, J. *483

Cynthia Keely Timms, Karin B. Torgerson, C. Michael Moore, Locke Liddell Sapp, LLP, Dallas, for Petitioner.

Jeffrey C. King, Jamie Lavergne Bryan, Hughes Luce, L.L.P., Dallas, for Respondent.

Laura Rowe, Hicks Thomas Lilienstern, LLP, Houston, J. Robert Beatty, Locke Liddell Sapp LLP, Dallas, Royal B. Lea III, Bingham Lea, P.C., San Antonio, Stephen L. Tatum, Cantey Hanger, L.L.P., Fort Worth, Joseph R. Knight, Baker Botts, Austin, for Amicus Curiae.

484 *484

Justice BRISTER delivered the opinion of the Court.

The Newton Corporation bid $300 at an industry auction, and got a quitclaim deed of Geodyne's[1] interest in an offshore mineral lease. Six months later, Newton was informed that the lease had expired and the operator wanted reimbursement for the costs of plugging and abandoning the well. Finding a violation of section 581-33(A)(2) of the Texas Securities Act (TSA),[2] the jurors and judges below rescinded the auction sale and assessed abandonment costs against Geodyne.[3]

[1] Petitioners Geodyne Energy Income Production Partnership I-E, Geodyne Energy Income Production Partnership I-F, Geodyne Production Partnership II-A, and Geodyne Resources, Inc. (collectively "Geodyne") are all Oklahoma general partnerships qualified to do business in Texas.

[2] TEX.REV.CIV. STAT. art. 581-33(A)(2).

[3] 97 S.W.3d 779, 785-86.

Since the adoption of section 33(A)(2) in 1963, this Court has never reviewed a claim against a seller under that section's private cause of action for misrepresentations in the sale of securities. The parties and several amici ask us to settle a number of questions that have arisen in the intermediate appellate courts regarding causation and affirmative defenses. But because we find the quitclaim deed here was not a misrepresentation, we must reverse the judgment below and leave those questions for another day.

I

In 1987, Geodyne obtained several oil-and-gas interests by special warranty deed, including a 10 percent interest in a lease known as Block 87-S in 485 the Gulf of *485 Mexico. The lessor was the State of Texas, through the General Land Office (GLO). At all relevant times here, the lease operator was Xplor Energy, Inc. or a corporate predecessor (Xplor).[4]

[4] Xplor bought Araxas Exploration, Inc. in September 1997. Araxas had been the operator since September 1996.

After the primary term expired, the lease remained in effect so long as oil or gas was produced in paying quantities. By December 1996, production had dwindled below that amount. Nevertheless, the lease provided for extension if reworking operations were begun within 60 days and continued without interruptions totaling more than 60 days.

In June 1997, Xplor wrote the GLO that it was "currently evaluating what further additional measures can be taken to restore production." On October 28, 1997, the operator's landman wrote the GLO detailing efforts in the last six months "to flow the well," and requesting that "before approving the necessary expenditures for the recompletion, our management would like an opinion from the GLO that the lease is still in effect."

The GLO did not respond for several months, but in an internal memo the landman recorded his impression that the GLO "does not appear to be overly concerned with the lack of production from the lease," and that "[i]f we restore production in paying quantities no later than 12 months after its cessation, the GLO should be satisfied on this point."

None of this was communicated to other interest owners. Throughout 1997, Xplor continued to send out joint interest billing statements, and Geodyne continued paying them.

On October 21, 1997, Geodyne contracted with an industry auctioneer to sell nearly thirty properties, including its interest in the Block 87-S well, without reserve. At the auction on December 9, 1997, Newton bought this interest for $300.

On March 4, 1998, almost three months later, an interoffice memo indicates the GLO told Xplor for the first time that the lease had expired and the well needed to be plugged. But Xplor did not notify the other interest holders in the lease until July 1998, at which time it asked for payment of each owner's proportionate share "at your earliest convenience."

Both Newton and Geodyne refused to pay. Xplor sued both to recover 10 percent of its plugging costs — $72,240.95.

The case was tried to a jury, which assessed the plugging costs against Geodyne, as well as $300 for Geodyne's violation of the TSA. Attorney's fees were tried to the trial judge, who awarded Newton $161,269.53 plus additional amounts for appeal.

After the trial, Geodyne settled with Xplor, but appealed the remainder of the judgment. The court of appeals generally affirmed, reversing only the fee award for failure to segregate recoverable from unrecoverable fees.[5] Geodyne now seeks review of that portion of the court of appeals' judgment rescinding the parties' contract under the TSA, and denying Geodyne's claim for reimbursement of the plugging costs.

[5] 97 S.W.3d at 790.

II A

Section 581-33(A)(2) imposes liability on "[a] person who offers or sells a security . . . by means of an untrue statement of a material fact or an
486 omission to state a *486 material fact."[6] The statute defines "security" to include interests in oil and gas leases.[7]

[6] TEX.REV.CIV. STAT. art. 581-33(A)(2).

[7] *Id.* art. 581-4(A).

The misrepresentation Newton alleged here had nothing to do with the plugging costs that (except for attorney's fees) made up most of the judgment. Newton's President, Pete Spiros, admitted knowing that interest owners must pay their share of plugging costs whenever a well stops producing,[8] and that all wells eventually do.

[8] *See* TEX. NAT. RES. CODE §§ 89.011, 89.012, 89.081.

Instead, the only misrepresentation Newton pleaded or tried to prove was that Geodyne represented it was selling a 10 percent interest in a valid lease.[9] Newton bases its claim on an auction catalog and an accompanying well-data-profile sheet identifying the property as "ST 87-S 1" and showing "GWI. 10000000."[10] It is undisputed there were no other communications or representations — Newton made no inquiries of Geodyne, and no one from Geodyne attended the auction.

9 Newton also asserted at trial that the auction documents represented the seller as Samson Resources Co. (Geodyne's owner) rather than Geodyne. But the transfer documents Newton signed indicated the correct owner, and no evidence was presented at trial that this error was material. *See* TEX.REV.CIV. STAT. art. 581-33(A)(2) (providing liability only for material misrepresentations).

10 Though not defined in the auction materials, "GWI" represents gross working interest — a percentage share of all expenses and revenues (the latter subject to royalties) in the well plus any royalties attributable to the working interest. *See* 8 HOWARD R. WILLIAMS CHARLES J. MEYERS, OIL GAS LAW, MANUAL OF TERMS 474, 1191 (2004) (citing the Energy Info. Admin. (of the U.S. Dep't of Energy)) (glossary *at* http://www.eia.doe.gov/) (last visited Apr. 5, 2005). While one listing in the materials showed a lower share after payout, it was clear that this well had not yet paid out, as an attachment showed costs of $1,857,449.95 and revenues of $1,475,504.63.

B

Geodyne argues there was no representation of valid title here because the sale to Newton was by quitclaim deed. Even though Geodyne obtained its interest by special warranty deed, it asserts it never purported to sell anything other than the interest it had, *if any*, at the time of the auction.

A warranty deed to land conveys property; a quitclaim deed conveys the grantor's rights in that property, if any.[11] We have long recognized the validity of quitclaim deeds, even if it turns out that they convey nothing.[12] In deciding whether an instrument is a quitclaim deed, courts look to whether the language of the instrument, taken as a whole, conveyed property itself or merely the grantor's rights.[13]

11 *Cook v. Smith*, 107 Tex. 119, 174 S.W. 1094, 1095 (1915).

12 *See, e.g., Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 769 (Tex. 1994); *Garrett v. Christopher*, 74 Tex. 453, 12 S.W. 67, 67 (1889); *Laurens v. Anderson*, 1 S.W. 379, 380 (Tex. 1886); BLACK'S LAW DICTIONARY 1126 (8th ed. 2004) (defining quitclaim deed as "[a] deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid").

13 *Porter v. Wilson*, 389 S.W.2d 650, 654 (Tex. 1965); *Cook*, 174 S.W. at 1094; *Threadgill v. Bickerstaff*, 87 Tex. 520, 29 S.W. 757, 758 (1895).

Here, the parties' Assignment and Bill of Sale identified the lease, but never stated the nature or percentage interest that was being conveyed. 487 Instead, it (1) *487 conveyed to Newton "all of [Geodyne's] right, title, and interest" in the described lease "AS IS, AND WHERE IS, WITHOUT WARRANTY OF MERCHANTABILITY," (2) provided that "this Assignment hereby conveys to Assignee . . . all of Assignor's right, title, and interest on the effective date hereof in and to the Property," and (3) concluded in the habendum clause that the

assignment was "WITHOUT WARRANTY OF TITLE, EITHER EXPRESS OR IMPLIED." As a matter of the law, this was a quitclaim deed.

C

Although the court of appeals recognized this fact,[14] it nevertheless found Geodyne misrepresented that it was selling a 10 percent working interest in a valid lease, when in fact the lease had expired.[15] For four reasons, we disagree.

14 97 S.W.3d at 785.

15 *Id.* at 786-87.

First, a 10 percent interest is exactly what Newton got. While the lease may have expired before the auction, the rights and duties of interest owners thereunder had not; indeed, it is precisely the 10 percent share of plugging costs that Newton is trying to avoid. Shortly after the auction, Newton recorded its interest, and it remained the owner of record until the time of trial. Newton requested and received a division order from Xplor listing Newton as an interest holder. Just because Newton got a 10 percent interest in liabilities rather than assets, that does not make the catalog listing a misrepresentation.

Second, as purchaser of a quitclaim deed, Newton cannot claim the deed itself was a misrepresentation that the lease was valid. Quitclaim deeds are commonly used to convey "interests of an unknown extent or claims having a dubious basis."[16] A quitclaim deed conveys upon its face doubts about the grantor's interest; any buyer is necessarily put on inquiry as to those doubts.[17] Thus, a quitclaim deed *without warranty of title* cannot be a warranty (or "misrepresentation") of title.[18]

16 *Porter*, 389 S.W.2d at 654.

17 *Richardson v. Levi*, 67 Tex. 359, 3 S.W. 444, 447-48 (1887).

18 *McIntyre v. De Long*, 71 Tex. 86, 8 S.W. 622, 623 (1888) ("Ordinarily, when a vendee accepts a quitclaim deed . . . the presumption of law is that he acts upon his own judgment and knowledge of the title, and he will not be heard to complain that he has not acquired a perfect title.")

That is not to say quitclaim deeds can never constitute misrepresentation. Despite the merger doctrine, prior agreements are not merged into a realty deed in cases in which a quitclaim deed is signed due to fraud, accident, or mistake.[19] Similarly, the merger doctrine may not prevent proof of prior misrepresentations under the Deceptive Trade Practices-Consumer Protection Act.[20] But as there was no evidence that anything other than a quitclaim deed was ever contemplated by the parties here, there is nothing to show Geodyne ever represented the validity of the underlying lease.

19 *Commercial Bank, Unincorporated v. Satterwhite*, 413 S.W.2d 905, 909 (Tex. 1967); *McIntyre*, 8 S.W. at 623.

20 *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988).

Third, the terms of the auction itself prevent any claim that Geodyne represented the lease was valid. The auction here was not open to the general public. To gain access, Newton's president had to *488 warrant that he had substantial experience and investments in the oil and gas business, and signed a two-page "Buyer's Terms and Conditions of the Sale" that stated:

> • **DUE DILIGENCE IS REQUIRED PRIOR TO BIDDING ON ANY PROPERTIES. BIDDER UNDERSTANDS AND AGREES THAT EBCO** [the auctioneer] **AND SELLER MAKE NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, ON THE PROPERTY LISTED FOR SALE AS TO ITS OIL AND/OR GAS PRODUCTION, MARKETABLE TITLE, CONDITION, QUALITY, FITNESS FOR GENERAL OR PARTICULAR PURPOSE, MERCHANTABILITY, OR OTHERWISE.** . . .
>
> • All descriptions of properties in the sale, including any published in sale brochures or promotional material, have been supplied by Seller for the sole purpose of identifying such properties . . . Well data and other information provided by Seller is intended solely as a guide for Bidder due diligence and is not a warranty or guarantee of any kind whatsoever.
>
> • **ALL INTERESTS BEING CONVEYED MUST BE VERIFIED BY BIDDER.** Neither Seller nor EBCO warrants or guarantees the accuracy of such interests.
>
> • **BIDDER ACKNOWLEDGES THAT HE HAS REVIEWED AND UNDERSTANDS THE TERMS OF THE SELLER'S CONVEYANCING DOCUMENTS.**

Having agreed to these terms to get into the auction, and having paid a mere $300 for a quitclaim deed without warranty of title, Newton cannot now claim the listing of "GWI. 10000000" was a representation of the validity of the lease.

Fourth, Newton admitted reviewing well files for the property showing virtually no production for January through June 1997. Also available at the auction was a Lease Income and Expense Summary showing "$0" spent for workover operations.[21] Immediately before the auction itself, an auctioneer announced that the well had no production. In this context, the identification of "GWI. 10000000" did not reasonably imply anything about the status of the lease.

[21] Newton points out that Geodyne omitted from the well file at the auction the joint interest billings on the well that would have shown no drilling or reworking operations were ongoing. But it was undisputed that the same information was included in the Lease Income and Expense Summary, which Newton had.

D

Newton raises two additional reasons why section 581-33 requires rescission of the sale. First, Newton points out that the section renders void any contractual provision requiring a buyer to waive compliance with the TSA.[22] Second, it points to the explicit provision in section 581-33(A)(2) of a defense to sellers if an alleged misrepresentation (a) was known to the buyer, or (b) could not reasonably have been discovered by the seller.[23] Newton argues the first renders void the warnings in the auction documents, and the second impliedly prohibits a defense based on a misrepresentation that *neither* party knew was false but *both* might have discovered.

[22] TEX.REV.CIV. STAT. art. 581-33(L).

[23] *Id.* art. 581-33(A)(2).

But before either of these statutory arguments come into play, there must be *489 some evidence 489 of a misrepresentation. By offering only a quitclaim deed, Geodyne *disclosed* that what it was selling might turn out to be nothing. The deed and documents here show that — viewing the entire transaction in context — there was no misrepresentation, not that Newton waived its right to assert one or that Geodyne had an affirmative defense against it.[24]

24 *Cf. Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 163-64 (Tex. 1995) (holding "as is" clause was not a waiver of Texas Deceptive Trade Practices-Consumer Protection Act).

E

We recognize there is some tension between the concepts behind quitclaim deeds and Blue Sky laws.[25] From inception, the latter were intended at least in part to curb oil-drilling investment schemes based on leases that existed only in the wild blue yonder.

25 BLACK'S LAW DICTIONARY (8th ed. 2004) (noting that appellation "blue-sky law" has "several suggested origins").

But both long before and long after the TSA was enacted, Texas law also recognized the validity and utility of quitclaim deeds. Indeed, the State itself sometimes uses them.[26] If Newton is correct in this case, then non-operating mineral interests can *never* be sold by quitclaim deed in Texas — a seller must either warrant title directly, or will be held to have done so indirectly by application of the TSA. We do not believe that is what the Legislature intended.

26 *See, e.g.*, TEX. TRANS. CODE § 202.025(4)-(5); TEX.REV.CIV. STAT. art. 5421d.

In 1983, the Legislature amended the TSA to provide that its purpose was not only "to protect investors," but consistent with that purpose "to encourage capital formation, job formation, and free and competitive securities markets and to minimize regulatory burdens on issuers and persons subject to this Act, especially small businesses."[27] Construing the TSA to outlaw quitclaim deeds would have serious consequences for jobs, markets, issuers, and small businesses, for several reasons.

27 TEX.REV.CIV. STAT. art. 581-10-1(B).

First, it is often difficult to tell whether a mineral interest has expired. Depending on the terms of each lease, expiration may turn on contingencies and activities that are controlled by others, difficult to ascertain, and (as our own docket shows) hotly disputed.[28] Even if a lease has expired, it may be ratified and revived by the lessor.[29] If mineral interests must be sold with warranty of title, many will be held in unproductive hands solely because the holder cannot afford the risk of sale.

28 *See, e.g., Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143 (Tex. 2004); *Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188 (Tex. 2003); *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550 (Tex. 2002); *Concord Oil Co. v. Pennzoil Exploration Prod. Co.*, 966 S.W.2d 451 (Tex. 1998).

29 *See Westbrook v. Atlantic Richfield Co.*, 502 S.W.2d 551, 553 (Tex. 1973).

Second, oil and gas leases are often held in fractional interests much smaller than those typical of other property.[30] As production and prices wax and wane, some interests will have exceedingly small financial value. As a result, the income from
490 *490 such interests may not justify the cost of monitoring their current status.

30 *See, e.g., Freeman v. Samedan Oil Corp.*, 78 S.W.3d 1, 8 n. 7 (Tex.App.-Tyler 2001, pet. granted, cause remanded w.r.m.) (noting that complainants' interest was 0.001296 on surface-acreage basis but only 0.000020 and 0.000061 under waterflood unit agreement).

Third, we long ago recognized that while deeds are usually drafted by grantors, mineral leases are usually drafted by lessees, whose primary interest is ensuring that the lessee gets everything the lessor has.[31] Quitclaim deeds must be viewed in this context — not as means for unscrupulous sellers to sell *nothing*, but for sophisticated and willing buyers to make sure they buy *everything*.

31 *McMahon v. Christmann*, 157 Tex. 403, 303 S.W.2d 341, 346 (1957).

While some might question the value of a commodity auction with so little potential value and so great potential risks, that is clearly not the view of the many companies who frequent them. According to its amicus brief, the Oil and Gas Asset Clearinghouse is the largest auction of mineral interests in the United States, closing more than 22,500 transactions involving hundreds of thousands of interests over the last ten years. Having chosen to play in such a market with such rules, the evidence here does not justify releasing Newton from its bargain.

A different question might be presented if there were evidence that Geodyne knew this lease had lapsed, or knew of an undisclosed and unexpected potential liability, but induced Newton to bid anyway by representing just the opposite.[32] But the jury found neither fraud nor fraudulent inducement here. As nothing in the Assignment or the auction documents represented that the lease had not expired, we hold that Geodyne's sale by quitclaim deed did not violate the TSA.

32 *See Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 162 (Tex. 1995) (stating that "as is" clause is not binding if induced by fraud or if buyer's inspection is impaired).

III

Because the court of appeals rescinded Geodyne's sale to Newton, it declined to enforce that part of their Assignment allocating expenses like the plugging costs at issue here.[33] Due to our opposite conclusion, we reach the opposite result.

33 97 S.W.3d at 790; *see* TEX.REV.CIV. STAT. art. 581-33(K) ("No person who has made or engaged in the performance of any contract in violation of any provision of this Act . . . may base any suit on the contract.")

The jury found that Geodyne was the interest owner when state law required the well to be plugged. But the parties here agreed that Newton would be liable for *all* expenses after the auction, *regardless* of which party was liable under state law:

> *Assignee shall* (i) upon closing, but effective as of the effective date hereof, *assume* and be responsible for and comply with all duties and obligations of Assignor, . . . including, without limitation, those arising under or by virtue of any lease, contract, agreement, document, permit, applicable statute or rule, regulation, or order of any governmental authority (specifically including without limitation, any governmental request or *requirement to plug, re-plug, and/or abandon any well* of whatsoever type, status or classification, or take any clean-up or other action with respect to the Property) and (ii) defend, indemnify and hold Assignor harmless from any and all claims in connection therewith, *except any such claims asserted against Assignor prior to the effective date hereof*. . . . (Emphasis added).

It is undisputed that Xplor first asserted its claims for plugging costs six months after the effective date of the parties' auction and sale. The provision above is not *491 ambiguous, and thus did not need to be submitted to the jury.[34]

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34 *Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 302 (Tex. 1993).

The trial court submitted the issue to the jury with instructions that Newton did not breach the agreement if there was either mutual mistake or no meeting of minds. By answering "no" to the breach question, jurors must have found one or both.

But a quitclaim deed cannot be set aside on either basis under these facts. A person who intentionally assumes the risk of unknown facts

cannot escape a bargain by alleging mistake or misunderstanding.[35] The Restatement gives the precise example of quitclaim deeds to illustrate this principle:

> A contracts to sell and B to buy a tract of land. A and B both believe that A has good title, but neither has made a title search. The contract provides that A will convey only such title as he has, and A makes no representation with respect to title. In fact, A's title is defective. The contract is not voidable by B, because the risk of the mistake is allocated to B by agreement of the parties.[36]

[35] *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990).

[36] RESTATEMENT (SECOND) OF CONTRACTS § 154, cmt b, illus. 1 (1981).

As the deed here purported to transfer Geodyne's interest whatever that might be, Newton's assumption that the lease was valid was neither a mutual mistake nor a mutual misunderstanding.[37]

[37] *Glash*, 789 S.W.2d at 264 ("The question of mutual mistake is determined not by the self-serving subjective statements of the parties' intent, which would necessitate trial to a jury in all such cases, but rather solely by objective circumstances surrounding execution of the [contract].")

* * * * *

Accordingly, we reverse in part the court of appeals' judgment and render judgment that Newton take nothing on its TSA claim against Geodyne. We remand the case to the trial court to render judgment in an amount to be determined for Geodyne on its indemnification claim and for further proceedings consistent with this opinion.

No. 05-10-01102-CV
Court of Appeals of Texas, Dallas.

Hall v. Douglas

380 S.W.3d 860 (Tex. App. 2012)
Decided Aug 29, 2012

No. 05–10–01102–CV.

2012-08-29

Michael H. HALL and Emajean Haggard Hall, Trustee, Appellants, v. James R. DOUGLAS, Jr., Barbara Douglas, Douglas Properties, Inc., Douglas/Hall, Ltd., Douglas Properties/Development, Inc., and Graham Mortgage Corporation, Appellees.

Jeffrey M. Travis, Richard J. Pradarits, Travis & Calhoun, P.C., Dallas, TX, Hastings Lyle Hanshaw, Collin D. Kennedy, Hanshaw Kennedy, LLP, Frisco, TX, for Appellants. Luke Madole, Timothy Patrick Chastain, Thomas F. Allen, Jr., Carrington, Coleman, Sloman & Blumenthal, L.L.P., Richard Illmer, Brown, McCarroll, L.L.P., Dallas, TX, Elizabeth G. Bloch, Brown, McCarroll, L.L.P., Austin, TX, for Appellees.

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Jeffrey M. Travis, Richard J. Pradarits, Travis & Calhoun, P.C., Dallas, TX, Hastings Lyle Hanshaw, Collin D. Kennedy, Hanshaw Kennedy, LLP, Frisco, TX, for Appellants. Luke Madole, Timothy Patrick Chastain, Thomas F. Allen, Jr., Carrington, Coleman, Sloman & Blumenthal, L.L.P., Richard Illmer, Brown, McCarroll, L.L.P., Dallas, TX, Elizabeth G. Bloch, Brown, McCarroll, L.L.P., Austin, TX, for Appellees.

Before Justices BRIDGES, FRANCIS, and LANG.

865 *865

OPINION

Opinion By Justice BRIDGES.

Appellants Michael H. Hall ("Hall") and Emajean Haggard Hall (the "Trustee") appeal from the trial court's order granting summary judgment in favor of appellees James R. Douglas, Jr., Barbara Douglas, Douglas Properties, Inc., Douglas/Hall, Ltd., Douglas Properties/Development, Inc. (collectively referred to as the "Douglas Appellees") and Graham Mortgage Corporation ("Graham"). In six issues, appellants argue the trial court erred by granting: (1) Graham's motion for partial summary judgment regarding the Trustee's fraud claim; (2) the Douglas Appellees' no-evidence motion for summary judgment against the Trustee; (3) the Douglas Appellees' no-evidence motion for summary judgment against Hall; (4) the Douglas Appellees' traditional motion for summary judgment against Hall because he had standing to bring his claims; (5) Graham's motion for summary judgment for appellants' remaining claims; and (6) sustaining appellees' objections to the testimony of Hall and Bettie Miller offered in support of appellants' responses to motions for summary judgment. We affirm.

Background

In 2003, appellee Hall [1] entered into an agreement with Douglas Properties, Inc. and James R. Douglas, Jr. to form a limited partnership known as Douglas/Hall, Ltd. ("DHL"). The parties agreed that Douglas Properties, Inc. would be the general partner, owning a one percent interest, and Hall and Douglas would be limited partners, owning 50 and 49 percent interests, respectively. The purpose

of the partnership was to "acquire, own, operate, manage, and develop" a 320 acre tract of land in Collin County, Texas (the "Hall Tract"), owned by the Trustee. Hall was the beneficiary of the trust under which the land was being held. The DHL partnership agreement contained provisions regarding a "development loan" and contained provisions regarding the general partner's obligation to develop the Hall Tract.

[1] Hall is the Trustee's son.

In June 2003, the Trustee sold the Hall Tract to DHL. In connection with its purchase of the Hall Tract from the Trustee, DHL signed a promissory note in the amount of $9,090,335.27 payable to the Trustee. The Trustee's promissory note was secured by a deed of trust on the Hall Tract ("Trustee's Deed of Trust"). In addition, DHL signed a promissory note in the amount of $1.5 million payable to Graham. The note was secured by a deed of trust on the Hall Tract in favor of Graham ("Graham Deed of Trust"). The Trustee's Deed of Trust recites that lien priority belonged to Graham under the Graham Deed of Trust and refers to Graham's lien as a "prior lien."

In 2005, DHL borrowed $3,074,000 from Graham ("2005 Loan"). DHL used a portion of the proceeds of this loan to pay the balance due on the $1.5 million promissory note payable to Graham. As part of this transaction, the Trustee signed a subordination of her lien, providing that her lien would become "second, subordinate, and inferior" to a 2005 deed of trust lien signed by DHL to secure payment of the 2005 Loan.

In November 2006, DHL borrowed another $3.5 million from Graham ("2006 Loan"). This loan was secured by a second deed of trust lien in favor of Graham on the Hall Tract. The Trustee again subordinated her lien. Hall signed a "Consent of Partners" authorizing Douglas Properties, Inc. as
866 general partner of *866 DHL to undertake actions to complete the loan transaction. The agreements between DHL and Graham for both the 2005 Loan and the 2006 Loan included a provision regarding advances from the loan proceeds. In a paragraph entitled "Future Advances," both agreements provided that advancements could be made to DHL "for the sole purpose of paying the costs (including the payment of accrued interest under the Note) reasonably and necessarily incurred by Borrower in connection with the ownership, operation and development of the Property into single-family residential lots, a minimum of one acre each." The "Property" referred to in this provision was the Hall Tract.

In August 2008, appellants filed this lawsuit against the Douglas Appellees, Graham, and others,[2] alleging fraud in a real estate transaction, common law fraud, conspiracy to defraud, breach of fiduciary duty, and breach of the partnership agreement. Appellants also sought judicial foreclosure of the promissory note payable by DHL to the Trustee and the deed of trust securing that note. Graham then initiated foreclosure proceedings under the deeds of trust securing the 2005 Loan and the 2006 Loan, and appellants filed an application for a temporary injunction against foreclosure, pending trial on the merits. The trial court granted the temporary injunction, and Graham appealed. In *Graham Mortg. Corp. v. Hall,* 307 S.W.3d 472, 474–77 (Tex.App.-Dallas 2010, no pet.), this Court affirmed the trial court's grant of the temporary injunction.

[2] The others are not a party to this appeal.

A couple of months later, in April 2010, Graham and the Douglas Appellees filed their motions for summary judgment in the trial court. The Douglas Appellees filed a traditional and no-evidence motion for summary judgment. Graham filed a partial no-evidence motion for summary judgment regarding the Trustee's fraud claims against Graham. The trial court granted both motions. In June of 2010, Graham filed its motion for summary judgment on the remaining claims, and the trial court granted that motion as well. In

conjunction with the motions for summary judgment, the trial court also granted many of the objections to and motion to strike portions of appellants' summary judgment evidence.

Analysis

1. Summary Judgment Standard

The standards for reviewing a traditional summary judgment are well established. The party moving for summary judgment has the burden of showing no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See*Tex.R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 548 (Tex.1985). In deciding whether a disputed material fact issue exists, precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon,* 690 S.W.2d at 548–49. Further, every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* A motion for summary judgment must expressly present the grounds upon which it is made and must stand or fall on those grounds alone. *McConnell v. Southside Indep. Sch. Dist.,* 858 S.W.2d 337, 341 (Tex.1993); *Espalin v. Children's Med. Ctr. of Dallas,* 27 S.W.3d 675, 688 (Tex.App.-Dallas 2000, no pet.).

We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. *See*Tex.R. Civ. P. 166a(i); *867 *Gen. Mills Rests., Inc. v. Tex. Wings, Inc.,* 12 S.W.3d 827, 832–33 (Tex.App.-Dallas 2000, no pet.). Thus, we must determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. *Gen. Mills,* 12 S.W.3d at 833. When analyzing no-evidence summary judgments, we consider the evidence in the light most favorable to the nonmovant. *Id.*

In the present case, the trial court did not specify the grounds on which the Douglas Appellees' summary judgment motion was granted. If a summary judgment order issued by the trial court does not specify the ground or grounds relied upon for a ruling, the ruling will be upheld if any of the grounds in the summary judgment motion can be sustained. *Bradley v. State ex rel. White,* 990 S.W.2d 245, 247 (Tex.1999); *Ortega v. City Nat. Bank,* 97 S.W.3d 765, 772 (Tex.App.-Corpus Christi 2003, no pet.). When the motion for summary judgment presents both no-evidence and traditional grounds, appellate courts usually review the no-evidence grounds first. *See Kalyanaram v. Univ. of Tex. Sys.,* 230 S.W.3d 921, 925 (Tex.App.-Dallas 2007, pet. denied).

2. The Trustee's Fraud Claim Against Graham

In their first issue, appellants contend the trial court erred in granting Graham's motion for partial summary judgment regarding the Trustee's fraud claim. Specifically, appellants argue the trial court erred in granting summary judgment because "there was evidence that Graham made false statements with the intent that [the Trustee] rely upon them, and there was evidence of [the Trustee's] actual, detrimental reliance on those statements by Graham."

The elements of fraud are: (1) that a material misrepresentation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Aquaplex, Inc. v. Rancho La Valencia, Inc.,* 297 S.W.3d 768, 774 (Tex.2009). Thus, in their brief, appellants argue they presented at least some evidence with regard to the fourth and fifth elements sufficient to preclude summary judgment.

With regard to the fourth element, appellants contend Graham defrauded the Trustee by representing "in the loan documents themselves" that the loans it was making to DHL were going to be used for the development of the Hall Tract.

Appellants argue that, even though Graham knew the loans were not going to be used for development, Graham made these representations to make it appear as though the Trustee was required to subordinate her lien on the Hall Tract to Graham's liens. Under the fifth element, appellants contend there was evidence the Trustee relied on Graham's alleged false statements because "she signed the subordination documents, subordinating her first lien to Graham's liens (as she was legally obligated to do if the loans were truly to be used for the development of the [Hall Tract])." Appellants assert that, from the fact that the Trustee signed the subordination agreements, the trial court should have inferred that the Trustee relied on Graham's statements that the loans would be for the development of the Hall Tract.

a. 2003 Loan

We first note that appellants, in making their
868 arguments, cite this Court to *868 the 2005 Loan and the 2006 Loan documents. Although appellants appear to reference a 2003 loan, they have not directed us to a copy of such loan, and we have not found a copy of a 2003 loan within the record. [3] Therefore, we do not know what the 2003 Loan, if any, stated with regard to its purpose (whether for development or otherwise). It is not our duty to wade through a voluminous record to verify appellants' claim. *Fredonia State Bank v. Gen. Am. Life Ins. Co.,* 881 S.W.2d 279, 283 (Tex.1994).

[3] Although the record contains a contract of sale and a 2003 purchase money promissory note between DHL and the Trustee, a 2003 loan agreement between DHL and Graham is not among the documents included in the record.

Furthermore, when appellants allege the only evidence of fraud by Graham is contained within the loan document themselves, but there is no loan document to review, there is no evidence of any alleged fraudulent representation with regard to the 2003 loan. Thus, we conclude the trial court properly granted summary judgment on the Trustee's claim for fraud against Graham with regard to the 2003 loan, if any. *See Gen. Mills,* 12 S.W.3d at 833.

b. 2005 Loan and 2006 Loan

With regard to the 2005 and 2006 Loan documents, we consider the fifth element of the Trustee's claim of fraud—reliance. Although she asserts a claim for fraud against Graham, the Trustee did not testify as to her reliance on Graham's alleged representations. In fact, citing health reasons, the Trustee filed a motion to quash and motion for protective order to prevent the taking of her deposition. The Trustee also failed to attach an affidavit to her response to Graham's partial motion for summary judgment, testifying as to her reliance.

Instead, the Trustee argues on appeal that the fact she signed the subordination documents is evidence she relied on Graham's representations that the loans were to be used for development. Citing *Anderson v. Anderson,* 620 S.W.2d 815 (Tex.Civ.App.-Tyler 1981, no writ), appellants contend "a court can and should infer from the fact that a person signs a document that they relied upon the statements set out in the document."

In *Anderson,* the executed deed at issue stated that it conveyed the property in question "for and in consideration of Altha Miller, my granddaughter, providing for the adequate care and maintenance of me during the remainder of my lifetime." *See id.* at 816–17. The court noted that when Altha had received the deed, the evidence disclosed that she had already decided she could not fulfill and had no intention of performing the support obligation at the time of the execution of the deed. Therefore, the court determined the fact that Anderson executed the deed to her homeplace for the sole consideration of the representation for care and maintenance during her lifetime is evidence of her reliance on such representation. *See id.* at 819.

In the case before us; however, neither of the subordination of lien agreements state they are made in reliance of any representation of development plans made in the 2005 Loan or the 2006 Loan documents. As already noted, the Trustee did not testify as to her reliance on statements made in the loan documents. In addition, with regard to the 2005 Loan, the Trustee subordinated her lien on July 14, 2005. But the 2005 Loan was not executed until July 18, 2005—four days *after* she subordinated her loan. The evidence, thus, seems to indicate she could not have relied on the 2005 Loan (a document which existed at a future time) when she subordinated
869 her *869 rights in 2005. Furthermore, although the 2005 Loan and 2006 Loan do contain a reference to development, they also include advances for the purpose of paying costs incurred by DHL "in connection with the ownership, operation *and* development of the [Hall Tract]." (Emphasis added). Thus, development is only one of three enumerated purposes stated within the loan documents. Without more, we cannot conclude the signing of the subordination agreements was evidence the Trustee relied on any representations of development made in the 2005 Loan and 2006 documents. *See Fredonia,* 881 S.W.2d at 283.

Because appellants have failed to provide evidence of reliance, an essential element of fraud, we conclude the trial court properly granted summary judgment on the Trustee's claim for fraud against Graham with regard to the 2005 Loan and the 2006 Loan. *See Gen. Mills,* 12 S.W.3d at 833. We overrule appellants' first issue.

3. The Trustee's Fraud Claim Against the Douglas Appellees

In their second issue, appellants contend the trial court erred in granting the Douglas Appellees' motion for summary judgment on the Trustee's fraud claims. Specifically, appellants argue there was sufficient evidence to prove: (1) the subordination agreements, signed by the Trustee, were secured by fraud; (2) common law fraud; (3) fraud in a real estate transaction; and (4) the Douglas Appellees conspired with Graham to defraud the Trustee.

a. Fraud as to the Subordination Agreements

In their brief, appellants argue Hall relied Douglas's statements to counsel the Trustee to sign the subordination documents. Appellants contend that, when Douglas gave Hall the subordination agreements, Douglas told Hall the loans were going to be used to develop the Hall Tract even though Douglas had no intention of developing the Hall Tract. Thus, appellants argue the representations to Hall constituted representations to the Trustee, and she relied on them.

As a general rule, a person making a representation is only accountable for its truth to the person he seeks to influence and no one else has a right to rely on the representation or make a claim based upon its alleged falsity. *See Jefmor, Inc. v. Chicago Title Ins. Co.,* 839 S.W.2d 161, 164 (Tex.App.-Fort Worth 1992, no writ) (citing *Westcliff Co. v. Wall,* 153 Tex. 271, 267 S.W.2d 544, 546 (1954)). As previously noted, the record contains no testimony from the Trustee, and thus no evidence from her with regard to what Hall told her and her alleged reliance on those statements.

Instead, the record contains the testimony of Hall in which he testified that he told the Trustee he "talked to [Douglas], [and that Douglas] was going to use this money towards the development of the property." The record also contains an affidavit from Hall which states Douglas knew that Hall was telling the Trustee the things Douglas said in connection with the Hall Tract. However, these statements do not provide evidence of what Hall told the Trustee or provide evidence of her reliance on those statements.

Still, appellants refer this Court to a statement in Hall's affidavit that if he had known Douglas had no intention of developing the Hall Tract, the Trustee "never would have executed the

subordination documents by which she agreed to subordinate her lien....” However, as we discuss more fully with regard to appellants' sixth issue below, mere speculation in an affidavit is
870 insufficient to establish a conclusion.*870 *See Ingram v. Deere,* 288 S.W.3d 886, 903 (Tex.2009).

Appellants next rely on *BP America Prod. Co. v. Stanley G. Marshall, Jr., et al.,* 288 S.W.3d 430, 445 (Tex.App.-San Antonio 2009), *rev'd on other grounds,* 342 S.W.3d 59 (Tex.2011) for the proposition that representations made by Douglas to Hall constitute representations to the Trustee upon which she can rely. However, in *BP,* there was evidence one sibling had been given authority to act on behalf of the others. *See BP,* 288 S.W.3d at 445. Thus, the court concluded that representations to the one sibling were effectively representations to the others. *See id.* Here; however, appellants do not cite us to, and we have found no, evidence that the Trustee gave Hall authority to act on her behalf. Again, appellants have failed to provide evidence of an essential element, namely reliance. We, therefore, conclude the trial court properly granted summary judgment in favor of the Douglas Appellees as to the Trustee's claim for fraud under the subordination agreements. *See Gen. Mills,* 12 S.W.3d at 833.

b. Common Law Fraud

Appellants next contend the trial court erred when it found there was no evidence: (a) of common law fraud when there was evidence of misrepresentations made by the Douglas Appellees; (b) of reliance by the Trustee on those representations; and (c) any such representations were the producing cause of harm to the Trustee. Appellants claim the Douglas Appellees committed fraud regarding the development of the Hall Tract. Specifically, appellants cite this Court to evidence which they contend demonstrates fraud, not only in the context of the subordination agreements, but also in connection with the initial sale of the Hall Tract.[4]

4 The pages cited as evidence by appellants are pages from the deposition testimony of Hall in which he discusses representations made in connection with the initial sale of the Hall Tract and the subordination agreements.

As we have already noted, the elements of common law fraud are: (1) that a material misrepresentation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Aquaplex,* 297 S.W.3d at 774. With regard to common law fraud, appellants allege there was sufficient evidence as to the second, fifth and sixth elements.

Because we have already concluded there is no evidence of reliance as to the Trustee's claim for fraud under the subordination agreements, and thus an essential element is missing for that claim, we turn to the question of whether there was evidence of fraud in connection with the initial sale of the Hall Tract. In making their argument, appellants assert Douglas met with the Trustee before she sold the Hall Tract, and that “Douglas represented directly to her at that time that he intended to develop the property.” Appellants also state that Douglas repeated these representations “over the next several years that he was developing the [Hall Tract].” Appellants conclude, given that the Hall Tract was undeveloped at the time the trial court granted summary judgment, none of the representations were true. We disagree with appellants' analysis.

A statement of future performance cannot serve as the basis for fraud unless there was no intention of
871 performing*871 the promise *at the time it was made. Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.,* 960 S.W.2d 41,

48 (Tex.1996). In order to prevail, appellants must present evidence that the Douglas Appellees made representations with the intent to deceive and with no intention of performing as represented at the time such representations were made. *See id.* But appellants have not cited us to any evidence, and we have found none, which demonstrates any representations by the Douglas Appellees regarding the development of the Hall Tract prior to the initial sale in 2003 were false. It is not our duty to wade through a voluminous record to verify appellants' claim. *Fredonia,* 881 S.W.2d at 283. Therefore, we conclude there is no evidence the Douglas Appellees made a false statement to the Trustee prior to the initial sale in 2003.

Because evidence of an essential element was missing, the trial court properly granted summary judgment as to the Trustee's claims of common law fraud against the Douglas Appellees. *See Gen. Mills,* 12 S.W.3d at 833.

c. Fraud in a Real Estate Transaction

In support of their argument, appellants direct this Court to section 27.01(a)(2) of the business and commerce code, which provides:

(a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a

...

(2) false promise to do an act, when the false promise is

(A) material;

(B) made with the intention of not fulfilling it;

(C) made to a person for the purpose of inducing that person to enter into a contract; and

(D) relied on by that person in entering into that contract.

Tex. Bus. & Com.Code Ann. § 27.01(a)(2). Appellants argue that, in this case, a false promise was made with the intent of not fulfilling it. They continue, "the false promise was the promise in the loan documents that the loans would be used for the development of the [Hall Tract]."

However, we have already noted that, although the 2005 Loan and 2006 Loan do contain a reference to development, they also include advances for the purpose of paying costs incurred by DHL "in connection with the ownership, operation *and* development of the [Hall Tract]." (Emphasis added). Development is only one of three enumerated purposes stated within the loan documents.

Furthermore, although appellants argue there was evidence that the Douglas Appellees made a false promise without the intent of fulfilling it, appellants have failed to cite us to any evidence in the record to support their position. Again, it has never been a part of an appellate court's duties to, itself, engage in time-consuming review of a voluminous record for evidence. *See Fredonia,* 881 S.W.2d at 283. Because there is no evidence of fraud in a real estate transaction, we conclude the trial court properly granted summary judgment in favor of the Douglas Appellees. *See Gen. Mills,* 12 S.W.3d at 833.

d. Conspiracy to Defraud

Lastly, appellants argue there was evidence that the Douglas Appellees conspired with Graham in order to defraud the Trustee. A civil conspiracy involves a combination of two or more persons with an unlawful purpose or a lawful purpose to
872 be accomplished by unlawful means. *See* *872 *Ins. Co. of N. Am. v. Morris,* 981 S.W.2d 667, 675 (Tex.1998). Fraud is the unlawful purpose or means that forms the basis of appellants' conspiracy claim here. Because we have already concluded that the trial court did not err in granting the Douglas Appellees' summary judgment on the Trustee's fraud claim and because the Trustee's conspiracy claim is premised on the Douglas Appellees' alleged fraud, our conclusion on the fraud issue necessarily disposes of the conspiracy claim. *See Ernst & Young, L.L.P. v.*

Pacific Mut. Life Ins. Co., 51 S.W.3d 573, 583 (Tex.2001). Thus, we conclude the trial court correctly granted summary judgment on the Trustee's conspiracy claim. *See id.; Tara Capital Partners, L.L.P. v. Deloitte & Touche, L.L.P.,* No. 05–03–00746–CV, 2004 WL 1119947, *5 (Tex.App.-Dallas May 20, 2004, pet. denied) (mem. op.).

Therefore, based upon the foregoing, we conclude the trial court did not err in granting the Douglas Appellees' motion for summary judgment on the Trustee's fraud claims. *See Gen. Mills,* 12 S.W.3d at 833. We overrule appellants' second issue.

4. Hall's Standing to Bring Claims Against the Douglas Appellees

In their third issue, appellants contend the trial court erred in granting the Douglas Appellees' no-evidence motion for summary judgment against Hall as to his individual claims for breach of the partnership agreement and breach of fiduciary duty. Appellants also contend the trial court erred in granting the Douglas Appellees' no-evidence motion for summary judgment as to Hall's claims, brought as a beneficiary, for fraud, fraud in a real estate transaction, and conspiracy to commit fraud. In their fourth issue, appellants argue the trial court erred in granting the Douglas Appellees' traditional motion for summary judgment against Hall because he had standing to bring his claims. Because these two issues are related, we consider them together.

In a June 16, 2010 letter to the parties, the trial court stated:

The Court finds that Mike Hall cannot bring these causes of action as a beneficiary of this trust. Further, the Court finds that the partnership claims of Mike Hall are indirect claims. The Court grants Defendants' summary judgment motions against Mike Hall.

Thus, the trial court ruled that Hall lacked standing to bring both his individual claims and his claims as a beneficiary.

a. Hall's Individual Claims

We first address whether Hall had standing to bring his individual claims for breach of the partnership agreement and breach of fiduciary duty. Standing is a component of subject-matter jurisdiction, and a plaintiff must have standing to maintain a suit. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 445–46 (Tex.1993); *Spurgeon v. Coan & Elliott,* 180 S.W.3d 593, 597 (Tex.App.-Eastland 2005, no pet.). A person has standing to sue when he is personally aggrieved by the alleged wrong. *See Nootsie Ltd. v. Williamson County Appraisal Dist.,* 925 S.W.2d 659, 661 (Tex.1996). A person has standing if (1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; (2) he has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) he has a personal stake in the controversy; (4) the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or otherwise; or (5) he is an appropriate party to assert the public's interest in
873 the matter as well as his own. *See* *873 *Nauslar v. Coors Brewing Co.,* 170 S.W.3d 242, 249 (Tex.App.-Dallas 2005, no pet.).

Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate. *See Asshauer v. Wells Fargo Foothill,* 263 S.W.3d 468, 471 (Tex.App.-Dallas 2008, no pet.); *Nauslar,* 170 S.W.3d at 249. Only the person whose primary legal right has been breached may seek redress for an injury. *See id.*

In their brief, appellants argue DHL misappropriated DHL funds by taking "over $2,000,000 of [DHL] funds to pay [non-DHL] debts." This alleged misappropriation, appellants argue, constitutes a breach of the partnership agreement.

To support their argument, appellants cite this Court to section 152.210 of the business organizations code for the proposition that a

partner is liable to the partnership and other partners for any breach of the partnership agreement. *See*Tex. Bus. Org.Code§ 152.210. However, section 152.211 states that "a *partnership* may maintain an action against a partner for breach of the partnership agreement or for the violation of a duty to the partnership causing *harm to the partnership.*" *See id.* at § 152.211(a) (emphasis added). Because Hall argues the Douglas Appellees misappropriated *DHL funds,* we conclude the alleged harm is to DHL, not Hall. *See Asshauer,* 263 S.W.3d at 471–72;*Nauslar,* 170 S.W.3d at 250–51.

A limited partner does not have standing to sue for injuries to the partnership that merely diminish the value of that partner's interest. *See Swank v. Cunningham,* 258 S.W.3d 647, 661 (Tex.App.-Eastland 2008, pet. denied); *Nauslar,* 170 S.W.3d at 250–51. The right of recovery is DHL's alone, even though the economic impact of the alleged wrongdoing my bring about reduced earnings, salary or bonus. *See Nauslar,* 170 S.W.3d at 251. These damages, although cast as personal damages, belong to the partnership alone. *See Asshauer,* 263 S.W.3d at 472;*Nauslar,* 170 S.W.3d at 250 (damages belonged to partnership despite pleading he was "personally aggrieved" by and suffered "direct damages" from defendants). Therefore, Hall lacked standing to bring a claim for breach of the partnership agreement. See Tex. Bus. Org.Code § 152.211; *Asshauer,* 263 S.W.3d at 472;*Nauslar,* 170 S.W.3d at 250.

With regard to Hall's claim for breach of fiduciary duty, appellants argue that "using the [DHL] funds to pay [non-DHL] debts, without the knowledge or consent of the other partners is a breach of ... Douglas and Douglas Properties, Inc.'s fiduciary duties for which Mike Hall has a claim individually against Jim Douglas and Douglas Properties, Inc." Appellants attempt to distinguish this case from our decisions in *Asshauer* and *Nauslar* by making the following argument:

> First, Mike Hall is asking for, among other things, disgorgement of the money taken by the Douglas [Appellees] (and Graham) to pay the [non-DHL] loans. These requested damages are very different from seeking to recover for the diminution of Hall's partnership interest. When Douglas took this money from [DHL], he essentially made a distribution to himself and/or Douglas Properties, Inc. without making a pro rata distribution to Mike Hall. In this manner, Mike Hall suffered damages that are different from the damages that [DHL] itself suffered.
>
> However, we conclude these are not true distinctions. Even when cast as "personal damages," claims for "a diminution in value of partnership interests or a share of partnership income" may be asserted only by the partnership
> 874 itself. *See* *874 *Asshauer,* 263 S.W.3d at 471–72;*Swank,* 258 S.W.3d at 661.

To distinguish between injuries suffered by a partnership, for which Hall lacks standing, and those suffered directly by Hall, we must focus on the nature of the alleged injury. *See Asshauer,* 263 S.W.3d at 471–72;*Nauslar,* 170 S.W.3d at 248 (first considering the injury asserted). In his brief, Hall claims the injury derived from the Douglas Appellees' use of DHL funds to pay non-DHL loans without the knowledge or consent of the other partners, and these acts amounted to a breach of fiduciary duty. However, we fail to see how Hall was "personally aggrieved" by the alleged payments. Hall did not own the money used to pay non-DHL loans: it was an asset of DHL. Thus, only DHL would have standing to sue to get that money back. *See Nauslar,* 170 S.W.3d at 249–51 (limited partner cannot sue directly for damages suffered by partnership).

Hall also asserts that he suffered damages due to Douglas's alleged wrongful distribution from DHL funds to Douglas and/or Douglas Properties, Inc. without making a pro rata distribution to Hall. However, as a limited partner, Hall cannot sue directly for "distributions, profits, and other

benefits" he allegedly lost because of harms suffered by DHL. *Nauslar,* 170 S.W.3d at 248, 250–51.

We, therefore, conclude the "individual" claims alleged by Hall belonged to DHL alone, and Hall lacked standing to bring claims of breach of the partnership agreement and breach of fiduciary duty against the Douglas Appellees. *See Wingate v. Hajdik,* 795 S.W.2d 717, 719 (Tex.1990); *Asshauer,* 263 S.W.3d at 472;*Nauslar,* 170 S.W.3d at 250. The trial court properly granted summary judgment in favor of the Douglas Appellees on these claims. *See Gen. Mills,* 12 S.W.3d at 833.

b. Hall's Claims Brought as a Beneficiary

Appellants also contend the trial court erred in granting the Douglas Appellees' no-evidence motion for summary judgment as to Hall's claims, brought as a beneficiary of the trust, for fraud, fraud in a real estate transaction, and conspiracy to commit fraud. However, in their response to Graham's motion for summary judgment on the remaining claims, appellants concede that "Hall did not bring claims as a beneficiary of the trust." Because Hall failed to bring the claims as a beneficiary to the trial court, he failed to preserve his ability to argue claims as a beneficiary on appeal. *See*Tex.R.App. P. 33.1; *State Bd. of Ins. v. Westland Film Indus.,* 705 S.W.2d 695, 696 (Tex.1986); *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 675 (Tex.1979) (holding issues not expressly presented to trial court may not be considered on appeal as grounds for reversal of summary judgment). We overrule appellants' third issue.

c. The Douglas Appellees' Traditional Motion for Summary Judgment

Due to our conclusion that the Douglas Appellees are entitled to no-evidence summary judgment on Hall's claims, we need not determine whether the trial court should have granted their motion for traditional summary judgment. *See Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 600–02 (Tex.2004). Therefore, we also overrule appellants's fourth issue.

5. Appellants' Remaining Claims against Graham

After the trial court granted the Douglas Appellees' motion for summary judgment and Graham's partial motion for summary judgment, only two claims remained against Graham: conspiracy to defraud and breach of a fiduciary
875 duty. Appellants*875 argue the trial court erred in granting Graham's subsequent motion for summary judgment on the remaining claims.

Appellants' sole argument with regard to the remaining claims is that "[t]he trial court erred in granting this motion for the simple reason that it erred in granting the motions for summary judgment on the underlying claims for fraud and for breach of fiduciary duty." However, we have already determined the trial court properly granted Graham's partial motion for summary judgment as to appellants' claim for fraud. Because the conspiracy to defraud and breach of fiduciary duty claims were purely derivative of appellants' fraud claim, the trial court properly granted Graham's motion for summary judgment on the remaining claims. *See Ernst & Young,* 51 S.W.3d at 583 (because conspiracy and "aiding and abetting" claims were premised on the alleged fraud, summary judgment on the remaining claims was proper); *see also RTLC AG Products, Inc. v. Treatment Equip. Co.,* 195 S.W.3d 824, 833 (Tex.App.-Dallas 2006, no pet.) ("Civil conspiracy is a derivative tort and a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.") We overrule appellants' fifth issue.

6. Objections to Appellants' Summary Judgment Evidence

In appellants' sixth issue, they contend the trial court erred in sustaining appellees' objections to the testimony of Hall and Bettie Miller offered in support of appellants' responses to motions for summary judgment. Contained within the trial court's order granting Graham's partial motion for summary judgment and the Douglas Appellees' traditional and no-evidence motions for summary judgment, the trial court sustained "the evidentiary objections urged in the [Graham] Reply and in the [Douglas Appellees'] Reply." The trial court later issued a separate order, in which it also granted and denied specific objections lodged by the Douglas Appellees.

a. Standard of Review

We use the abuse of discretion standard to review a trial court's rulings on objections to admissibility of evidence. *See Whirlpool Corp. v. Camacho,* 298 S.W.3d 631, 638 (Tex.2009). The test for abuse of discretion requires us to determine whether the trial court acted in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Jelinek v. Casas,* 328 S.W.3d 526, 539 (Tex.2010).

b. Graham's Objections

Appellants first complain of Graham's objection contained within its motion for partial summary judgment and reply. Specifically, appellants complain of Graham's objection "to any and all summary judgment evidence attached to the Response which purports to, and to the extent same attempts to, vary or characterize the contents of [the 2005 Loan and the 2006 Loan] because same is not the best evidence of such contents, is hearsay and violates the parol evidence rule."

Appellants argue they never attempted to vary the terms of the loan documents and that the only evidence they presented, not in the loan documents, is the evidence that shows that Graham knew Douglas was using the loan proceeds for something other than the development of the Hall Tract. In support of their statement, appellants cite this Court to two pages (pages 64 and 66) of the deposition of Douglas. But these pages were not attached to appellants' 876 response to Graham's*876 partial motion for summary judgment. Thus, Graham's objection would not have included those pages, and the trial court did not rule on that evidence. We conclude further review is neither necessary nor allowed. *See One Call Sys., Inc. v. Houston Lighting & Power,* 936 S.W.2d 673, 677 (Tex.App.-Houston [14th Dist.] 1996, writ denied) (holding adverse ruling is required to preserve issue on appeal).

Appellants next complain of Graham's statement that "all of Ms. Miller's testimony about why [the Trustee] signed documents is objectionable as speculation into the mind of another, hearsay, lacking personal knowledge and [Graham] so objects." Appellants argue that "all of Ms. Miller's testimony is not mere speculation in to the mind of another, nor is it hearsay," and references us to pages 100–105 and 149–150 of the transcript from her deposition. We agree with appellants that not all of Miller's testimony is speculative. However, Graham did not object to *all* of Miller's testimony as speculative. Rather, Graham objected to that part of her testimony, which concerned " *why* [the Trustee] signed the documents." (Emphasis added).

We note that rule 602 contains a threshold requirement that witnesses may only testify to matters within their personal knowledge. Tex.R. Civ. Evid. 602. An exception to this requirement is the testimony of expert witnesses. *See id.* at 602, 703. Miller is not alleged to be an expert witness. Thus, we conclude the trial court could have reasonably concluded any testimony by Miller, concerning *why* the Trustee signed the documents was speculative and, therefore, not admissible. *See Camacho,* 298 S.W.3d at 638;*see also Wal–Mart Stores, Inc. v. Gonzalez,* 968 S.W.2d 934, 937–38 (Tex.1998) (indicating that a witness' testimony unsupported by personal knowledge was "mere speculative, subjective opinion of no evidentiary value").

c. The Douglas Appellees' Objections

In connection with the Douglas Appellees' objections, appellants first direct our attention to the following affidavit testimony of Hall:

> Anytime Mr. Douglas needed my mother to sign a document related to the Hall tract, he would provide the documents to me and ask me to take them to my mother for signature.

The Douglas Appellees objected to this statement on the basis that it was speculative, lacks foundation and personal knowledge, is conclusory and contains hearsay. *See*Tex.R. Civ. Evid. 602, 801–805. The Douglas Appellees also objected to this statement on the grounds that "there has been no showing of the frequency of the alleged situation between Mr. Hall and Mr. Douglas in order to constitute a habit pursuant to Tex.R. Evid. 406." The trial court granted the objection "to the extent that 'anytime' means 'every time.' "

Here, appellants contend the trial court's "changing of the testimony to fit the objections is odd (and in error). The statement in the affidavit was 'anytime,' not 'every time.' " However, "anytime" means "at any time whatever: under any circumstances." Webster's Third New Int'l Dictionary 97 (1981). We, therefore, conclude it was reasonable for the trial court to interpret "anytime" to mean "every time" and disallow the evidence to the extent it violates rule 406. *See*Tex.R. Civ. Evid. 406 (evidence of the habit of a person is relevant to prove that the conduct of the person was in conformity with the habit or routine practice).

Appellants next raise the following testimony
877 contained within Hall's affidavit:*877

> These documents included, but were not limited to, subordination agreements that [Douglas] and [Graham] wanted her to sign.

The Douglas Appellees objected to this statement on the basis that it calls for speculation, lacks foundation and personal knowledge, and is conclusory. *See*Tex.R. Civ. Evid. 602, 801–805. The Douglas Appellees further objected that the statement violates the Best Evidence Rule as the documents speak for themselves. *See id.* at 1001–1009.

In their brief, appellants only refute the trial court's ruling with regard to the Douglas Appellees' Best Evidence objection, but this was not the only ground on which the Douglas Appellees objected. As we have already noted, rule 602 contains a threshold requirement that witnesses may only testify to matters within their personal knowledge. Tex.R. Civ. Evid. 602. Therefore, we conclude the trial court could have reasonably determined any testimony by Hall, concerning what *Douglas and Graham wanted* was speculative and, therefore, not admissible. *See Camacho,* 298 S.W.3d at 638;*see also Wal–Mart Stores,* 968 S.W.2d at 937–38.

Appellants next bring our attention to the following testimony, contained within Hall's affidavit:

> Based on the communications I had with Jim Douglas, he knew that I was telling my mother the things he was telling me in connection with the [Hall Tract].

The Douglas Appellees objected on the basis that the foregoing statement calls for speculation, lacks foundation and personal knowledge, is conclusory, and contains hearsay. *See*Tex.R. Civ. Evid. 602, 801–805. Appellants argue "for the reasons already stated above, these statements are not speculative, do not lack foundation or personal knowledge, and are not conclusory." However, we conclude the trial court could have reasonably determined any testimony by Hall, concerning what *Douglas knew* was speculative and, therefore, not admissible. *See Camacho,* 298 S.W.3d at 638;*see also*Tex.R. Civ. Evid. 602; *Wal–Mart Stores,* 968 S.W.2d at 937–38.

Appellants next direct us to the following group of statements made by Hall in his affidavit:

[1] [5] If Jim Douglas had not made promises to my mother and me to re-pay my mother the $9,090,335 owed to her under the promissory note, and if Mr. Douglas had not promised my mother and I a lucrative development deal for the [Hall Tract], we would not have sold the property to Mr. Douglas.

[5] We have numbered these statements for ease of discussion.

[2] Prior to July of 2005, Mr. Douglas had never conveyed to me or my mother that he had no further intentions of developing the [Hall Tract].

[3] If he had, I would have never consented to the $3,074,000 loan that Douglas procured from [Graham] for [DHL] on July 18, 2005, and my mother never would have executed the subordination documents by which she agreed to subordinate her lien on the [Hall Tract] to [Graham's] lien for this loan.

[4] Prior to November 21, 2006, Mr. Douglas still had never conveyed to me or my mother that he had no further intentions of developing the [Hall Tract].

[5] If he had, I would have never consented to the $3,500,000 loan Douglas procured from [Graham] for [DHL] on November 21, 2006, and my mother never would have executed the subordination documents by which she agreed to subordinate her lien on the [Hall Tract] to [Graham's] lien for this loan.

878 *878 The Douglas Appellees objected to statement 1 on the grounds it calls for speculation, lacks foundation and personal knowledge, is conclusory, and contains hearsay. *See*Tex.R. Civ. Evid. 602, 801–805. The Douglas Appellees further objected statement 1, urging it violates the Best Evidence Rule as the agreement between the parties sets forth the promises and/or obligations between them. *See id.* at 1001–1009. The Douglas Appellees objected to statements 3 and 5 on the grounds that they call for speculation, lack foundation and personal knowledge, and are conclusory. *See*Tex.R. Civ. Evid. 602. Appellants, on the other hand, argue the referenced statements "clearly do not call for speculation." We disagree.

Statements 1, 3, and 5 are not only speculative in the fact that they set up a hypothetical situation and Hall lends a guess as to what he would have done, but also in concluding what the Trustee would have done under the same hypothetical situation. *See*Tex.R. Civ. Evid. 602; *see also Firemen's Ins. Co. of Newark, New Jersey v. Burch,* 442 S.W.2d 331, 333 (Tex.1968) (courts do not have the authority to give advice or decide cases based upon speculative, hypothetical, or contingent events); *Tex. Disposal Sys. Landfill, Inc. v. Texas Com'n on Envtl. Quality,* 259 S.W.3d 361, 363–64 (Tex.App.-Amarillo 2008, no pet.) (a purported injury was mere speculation as it depended on a series of possible future events). Therefore, the trial court properly sustained the objections to statements 1, 3, and 5. *See Camacho,* 298 S.W.3d at 638.

With regard to statements 2 and 4, the Douglas Appellees objected that these statements call for speculation, lack foundation and personal knowledge, and are conclusory. *See*Tex.R. Civ. Evid. 602. Again, appellants argue these statements "clearly do not call for speculation." However, we conclude the trial court could have reasonably determined testimony by Hall, concerning the *intentions of Douglas* was speculative and, therefore, statements 2 and 4 were not admissible. *See Camacho,* 298 S.W.3d at 638;*see also*Tex.R. Civ. Evid. 602; *Wal–Mart Stores,* 968 S.W.2d at 937–38.

Finally, appellants contend the Douglas Appellees "make two general objections to the testimony of Mike Hall 'as to the reliance of the [Trustee],' and the deposition testimony of Bettie Miller 'as it relates to the reliance of the [Trustee].' " Although appellants have failed to cite this Court to the

objections in the record, we presume that appellants are first referring to the following objection by the Douglas Appellees:

> Mr. Hall impermissibly attempts to speak to [the Trustee's] intentions, Mr. Douglas's intentions, [the Trustee's] knowledge, and why or why not [the Trustee] allegedly took certain courses of action. None of the attestations set forth below are within the personal knowledge of Michael Hall and each and every one of them calls for speculation, lacks foundation, and is conclusory (and in some cases, contains hearsay).

This objection was followed by the more specific references and objections to the affidavit that we have already discussed. Despite appellants' contention to the contrary, we conclude the trial court could have reasonably determined testimony by Hall, concerning the *intentions of Douglas,* the *intentions of the Trustee,* the *Trustee's knowledge,* and *why the Trustee* took certain courses of action was speculative and, therefore, was not admissible. *See Camacho,* 298 S.W.3d at 638;*see also*Tex.R. Civ. Evid. 602.

Second, we presume appellants are referring to the following objection by the Douglas Appellees:

879 *879

> Additionally, any testimony by Bettie Miller, who acts as an assistant to Mike Hall, that the Trustee relied upon alleged representations made by Jim Douglas is inadmissible because it is hearsay, lacks foundation and requires speculation.

As we did with Graham's objection to the testimony of Miller, we conclude the trial court could have reasonably determined any testimony by Miller, concerning *why* the Trustee signed the documents was speculative and, therefore, not admissible. *See Camacho,* 298 S.W.3d at 638;*see also Wal–Mart Stores,* 968 S.W.2d at 937–38.

Having concluded the trial court did not abuse its discretion by sustaining the complained-of objections, we overrule appellants' sixth issue. *See Camacho,* 298 S.W.3d at 638.

Conclusion

Having overruled appellants' six issues, we affirm the judgment of the trial court. SeeTex.R. Civ. P. 166a(c), (i).

No. A-7833
Supreme Court of Texas

Hejl v. Wirth

343 S.W.2d 226 (Tex. 1961) · 161 Tex. 609
Decided Mar 8, 1961

No. A-7833.

January 25, 1961. Rehearing Denied March 8, 1961.

Charles G. Trenckmann, Austin, for petitioner.

Emmett Shelton, Austin, for respondents.

GREENHILL, Justice.

The question here is whether the last call in a deed shall be followed as a straight line or whether it is to be held to be a meander line and to run along the thread of a stream. The trial court held the call to be a meander line as a matter of law. That judgment was affirmed by the Court of Civil Appeals, one judge dissenting, 334 S.W.2d 498. We here reverse the judgments of both courts and hold that as a matter of law the call is for a straight line.

The suit was brought by Mrs. Wirth and others as an ordinary trespass to try title suit to recover title and possession to a tract of 72 acres of land in Travis County. The plaintiffs did not claim title by limitations. The defendant Hejl answered with a plea of not guilty and with pleas of limitation. He filed a quitclaim to all of the land described in the plaintiffs' petition except the 6 acres, more or less, indicated on the map below. That 6 acres is the subject of this litigation.

It has long been the rule in this State that in a trespass to try title suit, the plaintiff must recover upon the strength of his own title. Kauffman v. Shellworth, 64 Tex. 179; Hovel v. Kaufman, Tex.ComApp., 1926, 280 S.W. 185; Davis v. Gale, 1960, Tex., 330 S.W.2d 610. If the plaintiff under the circumstances fails to establish his title, the effect of a judgment of take nothing against him is to vest title in the defendant. The rule is a harsh one, but it also has been well established as a rule of land law in this State. French v. Olive, 1887, 67
227 Tex. 400, 3 S.W. 568; Permian *227 Oil Co. v. Smith, 1934, 129 Tex. 413, 73 S.W.2d 490, 111 A.L.R. 1152.

Hodge is a common source of title. To establish her title to the land in question, the plaintiff Wirth introduced a deed from Hodge to Miller, her predecessor in title, dated 1878. A scaled map of the area in dispute is set out in the opinion of the Court of Civil Appeals, 334 S.W.2d 500, at page 501. The diagram set out below is not drawn to scale but is set out for illustrative purposes and so that the calls in the deed under which Mrs. Wirth et al. claim may be more easily followed.

228 *228

The description in the deed from Hodge to Miller reads:

> "Beginning in bed of Bear Creek; thence North 1330 vs. to Northeast corner of J. M. Hodge tract; thence West 510 vs. to corner in bed of Bear Creek; thence down the same to corner in same about 40 varas below the mouth of Little Bear Creek; thence South 38 East 560 vs. to the beginning, containing 72 acres of land more or less. * * *"

At the time of the conveyance, Hodge owned the land on both sides of Big Bear Creek. Hence he retained ownership of that portion to the west of the tract conveyed above. Subsequently Hodge conveyed that property on the west side. The question is whether the last call which begins in Big Bear Creek and goes "thence south 38 East 560 vs. to the beginning" in Big Bear Creek is a straight line or whether it is a meander line which follows Big Bear Creek to the place of beginning.

Both parties presented motions for instructed verdict at the close of the evidence. Hejl's motion was denied and Mrs. Wirth's was granted. The judgment for Mrs. Wirth et al., as above indicated, rests on the holding that, as a matter of law, the last call in the description is a meander line and that therefore the six acres was conveyed to Miller by the deed from Hodge.

In support of that holding, respondents Wirth et al. cite the following cases: Dutton v. Vierling, Tex.Civ.App., 152 S.W. 450, no writ history; Stover v. Gilbert, 112 Tex. 429, 247 S.W. 841; State v. Atlantic Oil Prod. Co., Tex.Civ.App., 110 S.W.2d 953, writ refused; Strayhorn v. Jones, 157 Tex. 136, 300 S.W.2d 623; County of St. Clair v. Lovingston, 23 Wall. 46, 90 U.S. 46, 23 L.Ed. 59, and Runion v. Alley, 19 Ky. 268, 39 S.W. 849.

It is the position of petitioner Heji and of the dissenting Justice of the Court of Civil Appeals that as a matter of law the call should be run as a straight line and that the six acres was not conveyed to Miller. In support of that position, they cite McKee v. Stewart, 139 Tex. 260, 162 S.W.2d 948, and Lewallen v. Mays, 265 Ky. 1, 95 S.W.2d 1125.

None of the cited Texas cases is in point. The property line in controversy in Stover v. Gilbert, supra, began on the northeast bank of the Brazos River and was marked out by seven course and distance calls introduced as follows: "Thence down the river the following courses and distance, viz.:" (112 Tex. 429, 247 S.W. 843). The line in controversy in Dutton v. Vierling, supra, began at a pecan tree on the bank of Brady Creek and ran: "thence S. 79 25 east down Brady Creek 111.28 vrs. to a stake * * *." (152 S.W. 451.) Three sets of field notes were involved in State v. Atlantic Oil Producing Co., supra. The controversial calls began on the north bank of the Sabine River in each set. The next calls in the respective sets of notes were (110 S.W.2d 555): "Thence West with said river at 338 vrs.," "thence up said river with its meanders," and "thence West with said river * * *." Each of the calls was followed by some thirty course and distance calls which, when applied on the ground, ran generally along the course of the river. The line in controversy in Strayhorn v. Jones, supra, formed by a number of short course and distance calls was introduced by the words, "Thence following the meanderings of White River and the Salt Fork of the Brazos to a point * * *." (157 Tex. 136, 300 S.W.2d 630.)

In all of these Texas cases, the property lines were formed by course and distance calls which contained, or were introduced by, words such as "down the river," "down the creek," "with said river," "with the meanders of the river," or similar phrases. There is no such language in or introduction to the call forming the line in controversy in this case. The line in controversy in McKee v. Stewart, supra, neither began nor ended in a creek. That decision is not controlling on this point. The Strayhorn and McKee cases discuss the
229 "strip or gore" *229 doctrine, but the respondents Wirth et al. do not here contend that the property in question passed from Hodge to Miller under that doctrine.

We do not regard either of the cited Kentucky cases as persuasive in the fact situation before us. In Runion v. Alley, supra, the court held that a conveyance containing a descriptive call which began at "a stake on the Sandy River" and ran "thence up Sandy River, nearly south, 29 poles 1 link, to a sycamore" conveyed to the thread of the stream. The court said: "It is a wellsettled rule of law that a conveyance of land to a water course, and thence with the same, passes title to the thread

of the stream, unless otherwise provided or indicated." The holding is harmonious with the Texas decisions analyzed above. It was held in Lewallen v. Mays, supra, that a line beginning on the north bank of a creek and running "thence up same N. 69 E. 32 poles to a beech and elm at the mouth of the branch near a road" (265 Ky. 1, 95 S.W.2d 126) should be run as a straight line and not as a meander line. Considering the Texas decisions analyzed above, it hardly seems likely, in the absence of other controlling circumstances, that a Texas court would agree with that decision.

County of St. Clair v. Lovingston, 23 Wall. 46, 90 U.S. 46, 23 L.Ed. 59, is closer in point. The government there awarded to veterans certain lands. In 1814, it gave Jarrot the tract in question. The description in the grant began at a designated point which was on the bank of the Mississippi River. It continued: "Thence S. 5 W. 160 poles to a point in the river. * * *" The call of South 5 degrees West approximated the bank of the river at that time. The government surveyed the land for another soldier in 1815, a year later, and the description (coming from the opposite direction) was "thence N. 5 E., up the Mississippi River and binding therewith. * * *" Subsequently, substantial land was accumulated by accretion to Jarrot's side of the river; and the question was whether Jarrot's land extended to the river or was limited to the straight line, "S. 5 W. 160 poles" from the place of beginning as set out in his deed; i. e., whether the government intended to retain whatever land there was between that line and the river. The court held that the river and not the straight line constituted the west boundary line of the tract. The Court said:

> "It may be considered a canon in American jurisprudence, that where the calls in a conveyance of land, are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." 90 U.S. at page 64.

The court then analyzed the fact situation before it to show that it would be unreasonable to conclude that the line was not to run with the course of the river.

It will be noted that while the court stated it to be a canon of American jurisprudence that the stream is the boundary of a tract of land when a line begins and ends in or on a stream or its bank, the canon was qualified in this language: "* * * unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise."

We may accept the canon set out in the Lovingston case. But we hold that this case comes within the qualification stated in the rule. We think it clear that in this case, as a matter of law, there is "something which excludes the operation of this rule by showing that the intention of the parties was otherwise." Those distinguishing circumstances and affirmative manifestations of intent are these:

1. Unlike the Lovingston case, the calls in Big Bear Creek do not consist merely of two calls, one of which begins and the other ends in the creek.
230 The first call here which *230 begins in the creek says, "thence down the same (Big Bear Creek) to corner in same about 40 varas below the mouth of Little Bear Creek." The parties thus deliberately went down the creek with a meander call for a certain distance to a corner. If they had intended for the entire western and southern boundary to be

the thread of the creek, they could have said from the first point in the creek: "thence down the same to the place of beginning."

2. After having come down Big Bear Creek with its thread to a corner below Little Bear Creek, the call does not continue "down the same," or "with the same," or words of similar import, but makes a call directly to the place of beginning without regard for the creek. Having demonstrated that they knew how to come down the creek to the point below Little Bear Creek, the parties or their attorneys placed in the deed a description which plainly and unambiguously called for a straight line to the place of beginning. Incidentally, the call below Little Bear Creek was to a "corner." While we would not rest the matter on the use of the word "corner," its use might be considered an additional circumstance that the parties intended the point to be a corner and not simply a passing call on the way down the thread of the stream.

As stated above, the respondents Wirth et al. do not contend that the 6 acres in question passed from Hodge to Miller under the "strip or gore" doctrine. We therefore express no opinion on that question.

The presumption that the grantor conveyed to the bed of a stream belonging to the grantor is a rebuttable one. It is a rule of construction used to assist in arriving at the intention of the parties. It may be rebutted by words which clearly indicate an intention to restrict the grant to points other than the thread of a stream. 8 American Jurisprudence 762, Boundaries § 23. We hold that such intention is manifest here as a matter of law. The call, "thence down the same to corner in same about 40 varas below the mouth of Little Bear Creek," is a meander call. The last call, "thence south 38 East 560 varas to the beginning" is a boundary line and does not follow the center line of the creek.

Under this construction of the Hodge deed to Miller under which Mrs. Wirth and others claim, we do not reach the question of title by adverse possession to the tract in question.

Under our construction of the deed from Hodge to Miller under which the plaintiffs Wirth et al. claimed, the plaintiffs in this trespass to try title suit failed to establish their title to the 6 acres in dispute. The judgments of the courts below are therefore reversed and judgment is here rendered for the petitioner Hejl.

STEAKLEY, J., not sitting.

CALVERT, Chief Justice.

I concur in the judgment entered. My difference with the majority lies in our approach to the problem.

The ultimate problem, as in all cases involving the interpretation of deeds, is one of ascertaining the intention of the parties to the Hodge-Miller deed. Smith v. Allison, 157 Tex. 220, 301 S.W.2d 608; Garrett v. Dils Co., 157 Tex. 92, 299 S.W.2d 904; 19 Tex.Jur.2d 391, 455, Deeds, Secs. 107, 145. The preliminary problem is one of evidence and may be stated thusly: What rules of evidence should be used in ascertaining the intention of the parties to the deed?

As I understand their opinion, the majority approve the rule quoted from the opinion of the Supreme Court of the United States in County of St. Clair v. Lovingston, 23 Wall. 46, 90 U.S. 46, 64, 23 L.Ed. 59, as follows:

> "It may be considered a canon in American jurisprudence, that where the calls in a conveyance of land, are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner

231 *231

> to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise."

That is a novel rule in the jurisprudence of this state and I seriously question the wisdom of our approving it. Although announced in the Lovingston case in 1874, the rule has never been approved by the courts of this or any other state and it has not been cited with approval by any federal court since 1904. I doubt that we can live with the rule.

The effect of the Lovingston rule is to create a presumption that any line, marked out by the descriptive calls in a deed, beginning and ending in or on the bank of a stream, is intended by the parties to be a meander line, and, in the absence of evidence of a contrary intent, it will be run as such. Whether the evidence of a contrary intent must be found in the deed or may be extrinsic is not stated. In this case the only evidence of intent considered by the majority is found in the deed. In the Lovingston case only extraneous facts were mentioned by the court as evidence of intent. What evidence may be considered by the court, a question unanswered in the majority opinion, is but one of many troublesome and vexing problems which approval of the Lovingston rule will bring. An analysis of the distinctions made by the majority between the two cases will disclose some of them.

The majority note only two points of distinction. These distinctions are based entirely on the number, arrangement and wording of the calls in the two deeds. Aside from the fact that the rule as announced in Lovingston recognizes no qualification based on the number or sequence of the calls which precede or form the line beginning and ending in or on the bank of a stream-that is, whether the critical line precedes or follows another which expressly meanders the stream-and expressly recognizes that it will apply when the line runs from one "corner" to another "corner" in or on a stream, the distinctions noted by the majority are less than convincing. To illustrate: Suppose the field notes in the deed in the Lovingston case were exactly the same but the critical line cut off 50 acres in the bend of a river or stream, would we then look only to the face of the deed, as the majority do in this case, and say that because of the number, arrangement and wording of the calls the line should be run as a meander line and the deed should be held to convey the 50 acres? I doubt it. Or suppose the field notes in the Hodge-Miller deed were exactly the same but the critical line cut off one-tenth of an acre instead of six acres, would we then say that the number, arrangement and wording of the calls established as a matter of law that the parties intended the critical line to be a boundary rather than a meander line and thus exclude the one-tenth of an acre from the conveyance? I doubt it. If we would not make those holdings, the distinctions made in the majority opinion are immaterial distinctions and will surely haunt us in future cases.

I would reject the rule of the Lovingston case and would continue to adhere to the rules long followed by the courts of this state in the interpretation of deeds. Those rules are settled and familiar and, on the whole, present fewer problems. When the descriptive calls in a deed are clear, admit of no ambiguity, and clearly identify the land conveyed, the lines of the property conveyed should be run precisely according to the descriptive calls unless a latent ambiguity develops when they are run on the ground. Richey v. Miller, 142 Tex. 274, 177 S.W.2d 255, 257, 170 A.L.R. 832; McKee v. Stewart, 139 Tex. 260, 162 S.W.2d 948, 950; 19 Tex.Jur.2d 455-457, Deeds, Sec. 145. If an ambiguity develops when the lines are run on the ground, recourse may be had to any competent and relevant evidence to ascertain the intention of the parties and resolve the ambiguity. 19 Tex.Jur.2d 487-495, Deeds, Secs. 165-169;
232 *232 Texas Law of Evidence by McCormick and Ray, Vol. 2, Sec. 1687.

The field notes in the Hodge-Miller deed are clear and unambiguous. The land they describe is clearly identifiable. Respondents do not claim that a latent ambiguity develops when the field notes are put on the ground. Neither do they contend

that the six acres were impliedly conveyed under the strip and gore doctrine. The judgment entered is therefore a correct judgment and I concur in it.

No. 05-13-01413-CV
Court of Appeals Fifth District of Texas at Dallas

Hodges v. Rajpal

459 S.W.3d 237 (Tex. App. 2015)
Decided Feb 27, 2015

No. 05–13–01413–CV

2015-02-27

Marshall Hodges, Individually and d/b/a Guaranteed Printing Supply, and Rhon Rommer, Appellants v. Jitendra Rajpal, Appellee

Steven R. Shaver , Christopher L. Ash , Mesquite, TX, for appellants. David M. Pyke , John Joseph Gitlin , Dallas, TX, for appellees.

On Appeal from the 95th Judicial District Court

239 *239

, Dallas County, Texas, Trial Court Cause No. 09–08231. Ken Molberg, Judge.

Steven R. Shaver, Christopher L. Ash, Mesquite, TX, for appellants. David M. Pyke, John Joseph Gitlin, Dallas, TX, for appellees.

Before Justices Fillmore, Stoddart, and Whitehill[1]

[1] The Honorable Kerry FitzGerald, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, was a member of the original panel and participated in the submission of this case but, due to his retirement, did not participate in the issuance of this opinion. Justice Whitehill succeeded Justice FitzGerald. Justice Whitehill has read the briefs and reviewed the record and now serves as a member of the panel.

OPINION

Opinion by Justice Fillmore

Marshall Hodges, individually and d/b/a Guaranteed Printing Supply, [2] and Rhon Rommer (collectively "appellants") assert the trial court erred by granting a judgment notwithstanding the verdict (JNOV) because appellee Jitendra Rajpal did not file a motion for JNOV, request that jury findings be disregarded, or request that the trial court enter judgment contrary to any of the jury findings; appellants had standing to assert their fraud, breach of contract, and breach of fiduciary duty claims; appellee did not seek judgment based on a purported failure of appellants to make an election of remedies; there was legally sufficient evidence of damages to support appellants' claims of breach of contract, fraud, and breach of fiduciary duty; and judgment based on a statute of
240 limitations defense was improper. Appellants*240 also assert the trial court abused its discretion by denying their motion to modify the judgment or, alternatively, for a new trial, and they are entitled to attorney's fees and pre-judgment interest. We affirm the trial court's judgment.

[2] The jury was instructed that whenever the entity Guaranteed Printing Supply was referred to in the exhibits, testimony, or jury charge, they were to "equate that entity with Hodges. In other words, Guaranteed Printing Supply is simply another way of saying Hodges."

Background

Factual Background [3]

[3] Some exhibits listed in the reporter's record either do not correspond to exhibits at trial or are not actually present in the record on appeal. For example, plaintiffs' exhibits 8 through 10 and 95 are not present in the reporter's record. However, viewing the evidence as a whole we are able to discern the substance of the evidence relied upon at trial, and the absence or mislabeling of any exhibit does not impact our analysis of the issues on appeal.

In late 2003, appellants were approached by a mutual acquaintance of Hodges and Rajpal, attorney E. Carter Crook, concerning a potential investment opportunity involving the purchase of a hotel, the Greenville Days Inn in Greenville, Texas (the Greenville property). Appellants visited the Greenville property and discussed the investment opportunity with Rajpal. Rajpal told appellants the Greenville property would be purchased, renovated, reflagged, [4] and resold for profit.

[4] The testimony at trial used the term "reflagging" to refer to a change in affiliation with a hotel chain franchisor. At the time of the purchase of the Greenville property, the seller had lost the prior "flag," or affiliation, with Ramada Inn & Suites, and could not utilize that franchisor's hotel reservation system. Rajpal testified that following purchase of the Greenville property, it was reflagged as a Quality Inn.

To facilitate investment in the Greenville property, Crook signed on behalf of appellants, pursuant to a power of attorney, an Agreement of Limited Partnership of Greenville Travelers, L.P. (the Greenville limited partnership agreement). According to the terms of the Greenville limited partnership agreement, appellants and Rajpal were limited partners. Rajpal was also the president and sole shareholder of Prospera Hospitality Group, Inc. (Prospera Hospitality), the general partner of Greenville Travelers, L.P. Along with other investors that included Rajpal, appellants each contributed $50,000 of investment capital to Greenville Travelers, L.P. In December 2003, the Greenville property was purchased by Greenville Travelers, L.P.

In February 2004, Rajpal approached appellants regarding a potential investment opportunity involving the purchase of another hotel, the Holiday Inn in Sulphur Springs, Texas (the Sulphur Springs property). Rajpal told appellants the Sulphur Springs property would require renovation but likely not be reflagged,[5] and would be resold for profit. In April 2004, Rajpal formed Sulphur Springs Travelers, L.P. Rajpal was a limited partner of Sulphur Springs Travelers, L.P., and although neither Hodges nor Rommer signed the Agreement of Limited Partnership of Sulphur Springs Travelers, L.P. (the Sulphur Springs limited partnership agreement), it was stipulated at trial that appellants were limited partners of Sulphur Springs Travelers, L.P. Prospera Sulphur Springs, Inc. (Prospera Sulphur Springs) was the general partner of Sulphur Springs Travelers, L.P., and Rajpal was the president and sole shareholder of Prospera Sulphur Springs. Along with other investors that included Rajpal, appellants each contributed $56,000 of investment capital to
241 Sulphur Springs Travelers, L.P. The Sulphur *241
Springs property was purchased in April 2004 by Sulphur Springs Travelers, L.P.

[5] The testimony at trial was that the Sulphur Springs property was in danger of losing its Holiday Inn flag if not remodeled; however, the Sulphur Springs property retained its Holiday Inn flag after purchase.

By June 2004, appellants had each received a copy of the Greenville limited partnership agreement and were concerned that the document did not conform to the verbal agreement they had with

Rajpal regarding the Greenville property. Specifically, the limited partnership agreement did not provide them a lien on, or some form of security interest in, the Greenville property. Appellants also found the Greenville limited partnership agreement deficient because it provided there would be no return of their capital contributions unless funds sufficient for that distribution were generated by operations or sale of the hotel. Appellants' objections to the Greenville limited partnership agreement were made known to Rajpal at that time.

Within months of the April 2004 purchase of the Sulphur Springs property, appellants each received a copy of the the Sulphur Springs limited partnership agreement. Appellants were dissatisfied with the terms of the Sulphur Springs limited partnership agreement because it did not provide them a lien on, or some form of security interest in, the Sulphur Springs property.

According to Hodges, in the summer of 2005, Rajpal approached appellants concerning a potential contract for the sale of the Sulphur Springs property and inquired whether they wanted to utilize their capital invested in Sulphur Springs Travelers, L.P. for the purchase of another hotel property in Tyler, Texas.[6] Appellants advised Rajpal that they were not interested in investing in another hotel property and, upon the sale of the Sulphur Springs property, they wanted their capital contributions returned along with their share of any profit arising from the sale of the property. Appellants recovered only their $56,000 capital contributions following the May 2005 sale of the Sulphur Springs property.

[6] Rajpal invested in other hotel properties in Ennis, Paris, and Tyler, Texas, and in Elk City, Oklahoma, and he owned a hotel property in Decatur, Texas.

The Greenville property was sold by Greenville Travelers, L.P. in December 2006. Appellants did not recover their $50,000 capital contributions to Greenville Travelers, L.P. following the sale of the Greenville property.

Claims Submitted to Jury and Jury's Findings

Appellants filed suit against Rajpal in June 2009 alleging numerous causes of action arising from their investments in Greenville Travelers, L.P. and Sulphur Springs Travelers, L.P.[7] Of the causes of action alleged in appellants' live pleading at the time of trial, their claims of breach of contract with regard to the Greenville limited partnership agreement, fraud arising from their investments in Greenville Travelers, L.P., and breach of fiduciary duty with regard to the Greenville and Sulphur Springs properties were submitted to the jury. The jury found in favor of appellants on three causes
242 of action: *242 breach of contract, fraud, and breach of fiduciary duty relating to Greenville property.

[7] Greenville Travelers, L.P., Sulphur Springs Travelers, L.P., Prospera Hospitality, and Prospera Sulphur Springs were named as defendants in appellants' First Original Petition but were not named in the Fourth Amended Petition, which was the live pleading at the time of trial. According to appellants' Motion to Enter Judgment, those "business entities filed bankruptcy, each was discharged from bankruptcy and this suit against each of the bankrupt parties was dismissed." Rajpal testified that Greenville Travelers, L.P., Sulphur Springs Travelers, L.P., Prospera Hospitality, and Prospera Sulphur Springs filed for bankruptcy protection.

With regard to breach of contract, the jury found Rajpal failed to comply with one or more material terms of the Greenville limited partnership agreement and awarded $20,000 to each appellant for damages that resulted from that failure. Breach of contract damages were based upon appellants' "reliance interest," defined by the jury charge as the "amount of money that [appellants] paid to

enter into the Greenville Travelers Limited Partnership Agreement." The jury awarded $140,000 to each appellant as reasonable and necessary attorney's fees related to appellants' breach-of-contract claims.

The jury found Rajpal committed fraud with respect to Greenville Travelers, L.P. The jury awarded $20,000 to each appellant as "out-of-pocket" damages, defined by the jury charge as the "value/amount of money [appellants] paid in exchange for an interest in the Greenville Travelers Limited Partnership Agreement." The jury found appellants were not entitled to reliance damages as a result of Rajpals' fraud, with "reliance" defined by the jury charge as the "value/amount of money" appellants "paid or gave in reliance on Rajpal's representations, or kept invested based on Rajpal's failure to disclose a material fact."

The jury found Rajpal breached his fiduciary duty to appellants regarding the Greenville Travelers, L.P. and awarded $25,000 to each appellant for "loss of contractual consideration," defined by the jury charge as the "value/amount of money [appellants] paid to enter into the Greenville Travelers Limited Partnership Agreement," and $25,000 to each appellant for "out-of-pocket" damages, defined by the jury charge as the "value/amount of money [appellants] paid in exchange for an interest in the Greenville Travelers Limited Partnership Agreement." The jury found Rajpal did not personally profit as a result of his breach of fiduciary duty to appellants.

Judgment

Appellants moved for entry of judgment based on the jury's verdict. Rajpal filed his response and request for judgment in his favor. Rajpal asserted appellants have no standing to bring their breach of contract, breach of fiduciary duty, and fraudulent concealment claims. Rajpal also asserted appellants were not entitled to recovery of damages because there was no evidence that wrongdoing by Rajpal caused damages to appellants, the jury charge contained improper measures of damages, and he was entitled to judgment on appellants' fraudulent inducement claims as those claims were barred by limitations. Rajpal also asserted there was no evidence to support the attorney's fees found by the jury, and appellants were required to make an election of remedies as to the theory of recovery on which they sought judgment. In his supplemental response to appellants' motion for entry of judgment, Rajpal asserted there is no evidence to support the jury's finding that October 31, 2007 was the date by which appellants should have discovered Rajpal's fraud with regard to Greenville Travelers, L.P.

After a hearing on entry of a judgment, the trial signed a take nothing judgment in favor of Rajpal. The judgment includes the trial court's order granting Rajpal's motion for JNOV. Appellants filed a motion to modify the judgment or, alternatively, for a new trial. Appellants' motion for new trial was overruled by operation of law. Appellants filed this appeal.

Standard of Review

We review a trial court's decision to grant or deny a motion for a directed 243 *243 verdict and a motion for JNOV under the legal sufficiency standard of review. *Helping Hands Home Care, Inc. v. Home Health of Tarrant Cnty., Inc.,* 393 S.W.3d 492, 515 (Tex.App.–Dallas 2013, pets. denied); *see also City of Keller v. Wilson,* 168 S.W.3d 802, 823 (Tex.2005) (test for legal sufficiency is same for directed verdict, JNOV, and appellate no-evidence review). We credit evidence favoring the jury verdict if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Tanner v. Nationwide Mut. Fire Ins. Co.,* 289 S.W.3d 828, 830 (Tex.2009). We will uphold the jury's finding if more than a scintilla of competent evidence supports it. *Id.*; *see also Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 334 (Tex.1998) (appellate court will sustain a no-evidence issue when: (1) record discloses a complete absence of evidence of vital fact; (2) the

court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) only evidence offered to prove a vital fact is no more than a mere scintilla; or (4) evidence establishes conclusively the opposite of the vital fact). When a trial court grants a motion for JNOV presenting multiple grounds but does not state the ground relied upon, the appellant has the burden of showing that the judgment cannot be sustained on any of the grounds stated in the motion. *Fort Bend Cnty. Drainage Dist. v. Sbrusch,* 818 S.W.2d 392, 394 (Tex.1991).

JNOV

In their first issue, appellants assert the trial court erred by granting the "unrequested" JNOV because Rajpal did not file a motion for JNOV, request that the jury findings be disregarded, or request that the trial court enter judgment contrary to any jury findings.

After receiving the jury's verdict and discharging the jury, the trial court stated to the parties' attorneys, "Get me a proposed judgment. Set it for judgment because there will be some motions that I need to deal with obviously.... I don't know how those fees just don't come right out. And, of course, there's some other questions, too, but ... you may convince me otherwise." Appellants filed their Motion to Enter Judgment. Thereafter, Rajpal filed his Response to [Appellants'] Motion to Enter Judgment and Motion for Judgment, asserting appellants' motion for judgment should be denied and their proposed judgment should not be entered, he was entitled to judgment on all of appellants' claims, and that a number of the jury's findings lacked evidentiary support and should be disregarded by the trial court. Rajpal also filed his Supplemental Response to [Appellants'] Motion to Enter Judgment, requesting the trial court to disregard the jury's answer to a question in the jury charge inquiring when appellants should have discovered Rajpal's fraud with regard to Greenville Travelers, L.P.

Appellants filed a Reply in support of their Motion to Enter Judgment in which they asserted, as they assert on appeal, that Rajpal's response to their Motion to Enter Judgment did not move for affirmative relief. We disagree.

In pertinent part, rule of civil procedure 301 provides:

> ...[Upon] motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence.

244 Tex.R. Civ. P.301; *see also* *244 *Brown v. Bank of Galveston, N.A.,* 963 S.W.2d 511, 513 (Tex.1998) (trial court may grant JNOV if there is no evidence to support one or more of the jury findings on issues necessary to liability). "We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it." *State Bar of Tex. v. Heard,* 603 S.W.2d 829, 833 (Tex.1980); *see also*Tex.R. Evid. 71 (when party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat plea or pleading as if it had been properly designated). In his response and motion for judgment, Rajpal specifically requested that jury findings be disregarded and for entry of judgment in his favor, and in his supplemental response, he requested that the trial court disregard a jury finding.[8] Rajpal captioned the relief he sought in his response to appellants' motion for entry of judgment as not only a response, but also a motion for judgment in his favor.

> 8 At the hearing on entry of judgment, the trial court stated it had reviewed appellants' motion for entry of judgment and Rajpal's response and supplemental response. At the end of that hearing, the trial court stated to counsel for the parties, "All right, guys. I'm going to look at this one more time. Just keep the ball in the air and get me a copy of your proposed judgment, and I'll sign one of the three or do my own." The

> record reflects the trial court clearly contemplated the potential for entry of a JNOV in Rajpal's favor.

Although not captioned a motion or supplemental motion for JNOV, it is clear from reading Rajpal's response and supplemental response that he was requesting that the trial court disregard a number of the jury's findings and to enter judgment in his favor. We resolve appellants' first issue against them.

Fraud

In their fifth issue, appellants contend a JNOV on their fraud claims based on the statute of limitations was erroneous. Appellants sued Rajpal for fraudulent inducement (or pre-investment fraud) and for fraudulent concealment (or post-investment fraud).[9] The jury found Rajpal defrauded appellants with respect to Greenville Travelers, L.P. Appellants contend that in response to appellants' motion for entry of judgment, Rajpal attacked only appellants' fraudulent inducement claims, although the jury's verdict was based on appellants' claims of fraudulent inducement and fraudulent concealment and did not distinguish between those theories of fraud.

[9] The jury was instructed that fraud could occur through either misrepresentation or failure to disclose:

> Fraud occurs when—
>
> a. a party makes a material misrepresentation, and
>
> b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and
>
> c. the misrepresentation is made with the intention that it should be acted on by the other party, and
>
> d. the other party acts in reliance on the misrepresentation and thereby suffers injury.
>
> * * *
>
> Fraud also occurs when—
>
> a. a party fails to disclose a material fact within the knowledge of that party, and
>
> b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, and
>
> c. the party intends to induce the other party to take some action by failing to disclose the fact, and
>
> d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

In his answer, Rajpal asserted the affirmative defense of limitations. As he asserted in his response to appellants' motion for entry of judgment, Rajpal argues on appeal that appellants' fraudulent inducement claims were barred by limitations.*245 The statute of limitations for appellants' fraud claims is four years. *See* Tex. Civ. Prac. & Rem.Code Ann. § 16.004(a)(4) (West 2002) (person must bring suit on actions for fraud not later than four years after day cause of action accrues). Rajpal argued he was entitled to judgment on appellant's claim of pre-investment fraud because the uncontroverted evidence was that the purported fraudulent statements regarding the Greenville limited partnership agreement were made by Rajpal more than four years before appellants filed suit in June 2009.

The evidence at trial was undisputed that appellants discerned no later than June 2004 that the Greenville limited partnership agreement was not in conformity with the alleged pre-investment representations by Rajpal concerning a security interest in the Greenville property and return of appellants' capital contributions, and that appellants raised their objections to the terms of the agreement with Rajpal at that time. Appellants testified they received the Greenville limited partnership agreement by June 2004 and raised

their objections to the terms of the agreement with Rajpal at that time. Appellants' cause of action for fraudulent inducement therefore accrued no later than June 2004. *See Seureau v. ExxonMobil Corp.,* 274 S.W.3d 206, 229 (Tex.App.–Houston [14th Dist.] 2008, no pet.) (where discovery rule applies, "the cause of action accrues when plaintiff knows, or through the exercise of reasonable care and diligence should have discovered, the nature of his injury and the likelihood that it was caused by the wrongful acts of another") (citing *Childs v. Haussecker,* 974 S.W.2d 31, 40 (Tex.1998)).

Appellants sued Rajpal for fraudulent inducement in June 2009, more than four years after they learned in June 2004 of that alleged fraud. Appellants' claims of fraudulent inducement were barred by the statute of limitations. We conclude the trial court did not err in granting a JNOV on appellants' claims they were fraudulently induced to enter into the Greenville limited partnership agreement.

Appellants contend Rajpal's argument in his response to appellants' motion for entry of judgment, that the statute of limitations barred appellants' claims of fraudulent inducement, did not attack appellants' post-investment fraudulent concealment claims.[10] Appellants assert the jury's verdict with regard to fraud was based on fraudulent inducement and fraudulent concealment and did not disclose whether the jury found one or
246 both types *246 of fraud.[11] With regard to their allegation of fraudulent concealment, appellants asserted Rajpal concealed or failed to disclose material facts to induce appellants to "keep their money invested with Rajpal or his companies." The elements of fraudulent concealment are: (1) existence of the underlying tort, (2) the defendant's knowledge of the tort, (3) the defendant's use of deception to conceal the tort, and (4) the plaintiff's reasonable reliance on the deception. *Mitchell Energy Corp. v. Bartlett,* 958 S.W.2d 430, 439 (Tex.Civ.App.–Fort Worth 1997, pet. denied).

10 The jury found that in the exercise of reasonable diligence, appellants should have discovered Rajpal's fraud with regard to Greenville Travelers, L.P. by October 31, 2007. In his supplemental response to appellants' motion to enter judgment, Rajpal asserted the jury answer should be disregarded because there is no evidence in the record to support that finding. We agree.

Appellants' argument that Rajpal failed to present adequate evidence to overturn that jury finding is misplaced. With regard to fraudulent concealment as an affirmative defense to the statute of limitations, appellants had the burden of coming forward with proof to support the allegation. *See Weaver v. Witt,* 561 S.W.2d 792, 793 (Tex.1977) (per curiam) (fraudulent concealment is affirmative defense to statute of limitations under which plaintiff has burden of coming forward with proof to support the allegation). Review of the entire record confirms there is no evidence to support the finding that October 31, 2007 was the date by which appellants should have discovered Rajpal's alleged fraud with regard to Greenville Travelers, L.P. At the hearing on the motion for entry of judgment, the trial court inquired of the parties' attorneys, "Where did the jury get their date on statute of limitations?" Appellants' counsel acknowledged, "That's a—that's a good question, Your Honor, exactly where they came up with it."

11 While appellants assert they alleged common law fraud, fraud in the inducement, and fraud by concealment, their fraudulent inducement and fraudulent concealment claims are subcategories of their common law fraud claims. *See Nat'l Prop. Holdings, L.P. v. Westergren,* No. 13–0801, ——S.W.3d ——, ——, 2015 WL 123099, at *2 (Tex.2015) (fraudulent

inducement is species of fraud that arises only in context of a contract); *see also Hooks v. Samson Lone Star, L.P.,* No. 12–0920, —— S.W.3d ——, ——, 2015 WL 393380, at *3 (Tex.2015) (fraudulent inducement is subspecies of fraud); *Haase v. Glazner,* 62 S.W.3d 795, 798 (Tex.2001) (fraudulent inducement arises only in context of a contract and requires existence of contract as part of its proof; without a binding agreement there is no detrimental reliance, and thus no fraudulent inducement claim); *Schlumberger Tech. Co. v. Swanson,* 959 S.W.2d 171, 181 (Tex.1997) (fraud by nondisclosure is subcategory of fraud).

Assuming evidence was admitted at trial that established Rajpal concealed or failed to disclose material facts with the intention to induce appellants to maintain their investments in Greenville Travelers, L.P., appellants have not attacked on appeal the jury's verdict with regard to damages for that fraudulent concealment. The jury found appellants were entitled to $20,000 each for the value of the money they "paid in exchange for an interest in the Greenville Travelers Limited Partnership Agreement" which were damages for appellants' fraudulent inducement claim that, as discussed above, was barred by limitations. However, as to appellants' fraudulent concealment claim, the jury found appellants' reliance damages, defined as the "value/amount of money [appellants] paid or gave in reliance on Rajpal's representations, or kept invested based on Rajpal's failure to disclose a material fact," were zero.

The jury's no-damage finding with regard to reliance damages compelled a take-nothing judgment on appellants' fraudulent concealment claims. *See Garza v. San Antonio Light,* 531 S.W.2d 926, 929 (Tex.Civ.App.–Corpus Christi 1975, writ ref'd n.r.e.) ("none" answer on damages rendered liability issue immaterial). Appellants did not raise a sufficiency challenge to the jury's no-reliance damage finding in their motion for new trial. *See*Tex.R. Civ. P. 324(b)(3) (point in motion for new trial that jury finding is against overwhelming weight of the evidence is prerequisite to that complaint on appeal); *see also Croucher v. Croucher,* 660 S.W.2d 55, 58 (Tex.1983) (party having burden of proof challenging factual sufficiency of adverse finding in trial court must show jury's finding was against great weight and preponderance of the evidence); *Murray v. Alvarado,* 438 S.W.3d 880, 886 (Tex.App.–El Paso 2014, pet. denied) (complaint jury finding is against great weight and preponderance of evidence waived on appeal where not raised in motion for new trial). Appellants assert no error on appeal regarding the jury's finding of no damages on their fraudulent concealment claims. *See Nat'l Prop. Holdings, L.P. v. Westergren,* No. 13–0801, —— S.W.3d ——, ——, 2015 WL 123099, at *6 (Tex.2015) (although jury found in favor of Westergren on liability questions concerning common law and statutory fraud, jury awarded no damages for either claim and Westergren did not appeal those
247 findings; *247 he therefore cannot recover damages on fraud claims).

Having concluded appellants' fraudulent inducement claims were barred by limitations, and there being no challenge to the jury's finding of no reliance damages based on appellants' post-investment fraudulent concealment claims, we conclude the trial court did not abuse its discretion by entering a take-nothing judgment on appellants' fraudulent inducement and fraudulent concealment claims. Accordingly, we resolve appellants' fifth issue against them.

Standing

In their second issue, appellants contend that to the extent the trial court granted the JNOV based on appellants' lack of standing under *Hall v. Douglas,* 380 S.W.3d 860 (Tex.App.–Dallas 2012, no pet.), the trial court erred. Appellants argue they have standing to maintain their breach of contract and breach of fiduciary duty claims.[12]

12 In their second issue, appellants also assert that, to the extent the trial court granted JNOV based on lack of standing to maintain their fraud claims, the trial court erred. We have concluded with regard to appellants' fifth issue discussed above that the trial court did not err in granting JNOV on appellants' fraud claims. Therefore, it is unnecessary for us to address appellants' standing argument relating to their fraud claims. *See* Tex.R.App. P. 47.1.

With regard to their breach of contract claims, appellants alleged they entered into the Greenville limited partnership agreement with Prospera Hospitality, the general partner of Greenville Travelers, L.P. As president of Prospera Hospitality, Rajpal signed the Greenville limited partnership agreement on behalf of Prospera Hospitality. According to appellants, contrary to requirements of the Greenville limited partnership agreement, Prospera Hospitality was insufficiently capitalized. Appellants alleged Rajpal owed contractual duties to them as fellow limited partners under the Greenville limited partnership agreement, and he breached various sections of the limited partnership agreement. Specifically, appellants alleged Rajpal withdrew and used partnership funds in violation of the agreement, and he failed to repay them their initial "loans/investments," distribute their share of profits associated with the Greenville property, or provide financial reporting or accounting required by the limited partnership agreement. They sought recovery of their initial "loans/investments" and profits from operation and sale of the Greenville property. The jury found Rajpal failed to comply with one or more of the material terms of the Greenville limited partnership agreement and awarded $20,000 damages to each appellant based upon their "reliance interest," defined by the jury charge as "the amount of money that [appellants] paid to enter into the Greenville Travelers Limited Partnership Agreement."

With regard to their breach of fiduciary duty claims regarding Greenville Travelers, L.P., appellants alleged Rajpal was the person in control of Greenville Travelers, L.P. and stood in a fiduciary capacity as to the limited partners. Appellants alleged Rajpal breached his fiduciary duties by misuse and mismanagement of Greenville Travelers, L.P.'s funds. The jury heard evidence that Rajpal used Greenville Travelers, L.P. funds to make a loan to himself, pay for a personal vehicle, pay a personal fine, compensate an attorney for legal services rendered on a personal matter, and pay expenses relating to a personal residence, notwithstanding the fact the Greenville limited partnership agreement provides Greenville Travelers, L.P. shall not make loans to
248 the general partner or *248 any person. Appellants alleged those breaches of fiduciary duty caused them "injury and damages."

The jury found Rajpal breached his fiduciary duty to appellants regarding Greenville Travelers, L.P.[13] and awarded appellants $25,000 each for "loss of contractual consideration," defined by the jury charge as the "value/amount of money [appellants] paid to enter into the Greenville Travelers Limited Partnership Agreement," and $25,000 for "out-of-pocket" damages, defined by the jury charge as the "value/amount of money [appellants] paid in exchange for an interest in the Greenville Travelers Limited Partnership Agreement."

13 The jury was instructed that because a relationship of trust and confidence existed between them, Rajpal owed appellants a fiduciary duty and, to establish he complied with his fiduciary duty, Rajpal had to prove: the "transaction in question" was fair and equitable to appellants; he made reasonable use of the confidence appellants placed in him; he acted in the utmost good faith and exercised the most scrupulous honesty toward appellants; he placed appellants' interests before his own, did not use the advantage of his position to gain any benefit for himself at appellants' expense, and did not place himself in a

> position where his self-interest might conflict with his obligations as a fiduciary; and, he fully and fairly disclosed all important information to appellants concerning "the transaction."

Relying on *Hall,* Rajpal argues appellants' breach of the Greenville limited partnership agreement and breach of fiduciary duty claims belong exclusively to the partnership, Greenville Travelers, L.P., and appellants lack standing to assert those claims. Standing is a component of subject-matter jurisdiction, and a plaintiff must have standing to maintain a suit. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 445–47 (Tex.1993); *Hall,* 380 S.W.3d at 872. A person has standing to sue when he is personally aggrieved by the alleged wrong. *Hall,* 380 S.W.3d at 872. A person has standing if:

(1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; (2) he has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) he has a personal stake in the controversy; (4) the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or otherwise; or (5) he is an appropriate party to assert the public's interest in the matter as well as his own.

Id.; see also Nauslar v. Coors Brewing Co., 170 S.W.3d 242, 249 (Tex.App.–Dallas 2005, no pet.).

Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate. *Hall,* 380 S.W.3d at 873; *see Asshauer v. Wells Fargo Foothill,* 263 S.W.3d 468, 471 (Tex.App.–Dallas 2008, pet. denied); *Nauslar,* 170 S.W.3d at 249. Only the person whose primary legal right has been breached may seek redress for an injury. *Hall,* 380 S.W.3d at 873; *Asshauer,* 263 S.W.3d at 471; *Nauslar,* 170 S.W.3d at 249.

Appellants cite to section 152.210 of the business organizations code for the proposition that partners are liable to "other partners" for breaches of a duty or breaches of a partnership agreement. While section 152.210 provides that a partner is liable to a partnership and the other partners for a breach of the partnership agreement or a violation of a duty to the partnership or other partners that causes harm to the partnership or other partners, Tex. Bus. Orgs.Code Ann. § 152.210 (West 2012), "section 152.211 states 'a *partnership* may maintain an action against a partner for breach of
249 the partnership *249 agreement or for violation of a duty to the partnership causing *harm to the partnership.*' " *Hall,* 380 S.W.3d at 873; *see also*Tex. Bus. Orgs.Code Ann. § 152.211(a) (West 2012).

In *Hall,* Michael Hall entered into an agreement with Douglas Properties, Inc. and James R. Douglas, Jr. (Douglas) to form a limited partnership, Douglas/Hall, Ltd. Douglas Properties was the general partner and Hall and Douglas were limited partners. The purpose of the limited partnership was to acquire and develop a tract of land in Collin County, and the limited partnership agreement contained provisions regarding a development loan and the general partner's obligation to develop the tract of land. Hall and others filed suit against Douglas, Douglas Properties, and others, alleging breach of fiduciary duty and breach of the partnership agreement. *Hall,* 380 S.W.3d at 864, 866. Like appellants here, the plaintiffs in *Hall* alleged the limited partner misappropriated funds. This Court concluded the harm alleged was to the limited partnership, not the limited partner. *Id.* at 873; *see also Asshauer,* 263 S.W.3d at 471–72; *Nauslar,* 170 S.W.3d at 250–51.

A limited partner does not have standing to sue for injuries to the partnership that merely diminish the value of that partner's interest. *Hall,* 380 S.W.3d at 873; *see Nauslar,* 170 S.W.3d at 250–51. Appellants alleged Rajpal breached the limited partnership agreement by failing to repay their

initial "loans/investments" and by failing to distribute their share of profits from operation and sale of the Greenville property. As this Court stated in *Hall,* the right of recovery belongs to the general partnership, "even though the economic impact of the alleged wrongdoing may bring about reduced earnings, salary or bonus." *Hall,* 380 S.W.3d at 873; *see Asshauer,* 263 S.W.3d at 472; *Nauslar,* 170 S.W.3d at 250 (damages belonged to partnership despite pleading he was "personally aggrieved" by and suffered "direct damages" from defendants).

The supreme court recently cited the holding in *Hall* that a limited partner does not have standing to sue for injuries to the partnership that merely diminish the value of that partner's interest. *In re Fisher,* 433 S.W.3d 523, 527 (Tex.2004, orig.proceeding) (citing *Hall,* 380 S.W.3d at 873)). The damages sought in *In re Fisher,* however, are distinguishable from the damages sought by the plaintiff in *Hall* and by appellants here. A limited partner in *In re Fisher* had standing to sue two other limited partners because he alleged personal damages unique to him, including a million dollar loan to the general partnership that other limited partners did not make, and he alleged damages for loss of earning capacity, damage to his credit and personal reputation, mental anguish, injury to his character, and false statements about him that subjected him to civil and criminal prosecution. *Id.* at 527–28.

In contrast, appellants here argue their breach of fiduciary claims are based on Rajpal's duties as a fellow limited partner. The claimed breaches of fiduciary duty by Rajpal, which all relate to alleged misuse or mismanagement of Greenville Travelers, L.P.'s funds, would have the effect of diminishing the assets and value of the limited partnership generally, and would not diminish the value of appellants' limited partnership interests exclusively. Because appellants argue Rajpal misused or mismanaged Greenville Travelers, L.P.'s funds, the alleged harm is to Greenville Travelers, L.P., not appellants individually. In other words, these damages, although cast as personal damages, belong to the limited partnership alone. Appellants do not have a separate, individual right of action for injuries to
250 the partnership, even *250 if the injuries diminished the value of their ownership interest in the entity. Thus, only Greenville Travelers, L.P. would have standing to sue to recover the allegedly misused or mismanaged funds. *See Hall,* 380 S.W.3d at 874; *Nauslar,* 170 S.W.3d at 249–51 (limited partner cannot sue directly for damages suffered by partnership).

In the context of the allegations made and the relief sought in this case, appellants lack standing to bring a claim for breach of the Greenville limited partnership agreement or for breach of fiduciary duty. *See*Tex. Bus. Orgs.Code Ann. § 152.211; *Hall,* 380 S.W.3d at 873; *Asshauer,* 263 S.W.3d at 472; *Nauslar,* 170 S.W.3d at 250. Appellants have failed to overcome controlling authority of this Court, and "we refuse to alter the clear language of the limited partnership act and case law to afford them standing to sue." *Asshauer,* 263 S.W.3d at 474. We conclude the trial court did not err in granting JNOV on appellants' breach of contract and breach of fiduciary duty claims. We resolve appellants' second issue against them.

Motion to Modify Judgment or Motion for New Trial

In their sixth issue, appellants contend the trial court abused its discretion by denying their motion to modify the judgment, and alternative motion for new trial, for reasons addressed in other issues, which are analyzed elsewhere in this opinion, and for the additional reason that the trial court refused to award appellants equitable damages for Rajpal's breach of fiduciary duty. According to appellants, equitable damages are "justified" based on evidence at trial of Rajpal's "self-dealing and failure to disclose material facts," and appellants are entitled to equitable relief even in the absence of actual damages. Because the jury found Rajpal

breached his fiduciary duty to appellants with regard to Greenville Travelers, L.P., appellants assert the trial court abused its discretion by failing to grant appellants' motion to modify the judgment or grant a new trial. Although the jury found Rajpal did not breach his fiduciary duty to appellants with regard to Sulphur Springs Travelers, L.P., and consequently no damages were awarded by the jury, appellants also assert the trial court erred by failing to award them equitable damages for that claim.

The standard of review for denial of a motion for new trial is abuse of discretion. *Dugan v. Compass Bank,* 129 S.W.3d 579, 582 (Tex.App.–Dallas 2003, no pet.). We review a trial court's denial of a motion to modify a final judgment under an abuse of discretion standard. *See Wagner v. Edlund,* 229 S.W.3d 870, 879 (Tex.App.–Dallas 2007, pet. denied). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or if it acts without reference to any guiding rules or principles. *Downer v. Aq u amarine Operators, Inc.,* 701 S.W.2d 238, 241–42 (Tex.1985).

We have concluded with regard to appellants' second issue that appellants lacked standing to assert their breach of fiduciary duty claims with regard to Greenville Travelers, L.P. and the trial court did not err by granting a JNOV on those claims. *See Hall,* 380 S.W.3d at 874 ("individual" claims alleged by the limited partner plaintiff belonged to limited partnership and plaintiff lacked standing to bring claims of breach of fiduciary duty against fellow limited partner).

The jury found no liability for breach of fiduciary duty regarding Sulphur Springs Travelers, L.P.[14] In their motion to enter judgment, appellants asserted Rajpal breached his fiduciary duty to them
251 regarding*251 Sulphur Springs Travelers, L.P. "as a matter of law based on the evidence." In their motion to modify the judgment or motion for new trial, appellants requested the trial court to modify its judgment and award them equitable relief requested in their motion to enter judgment. We question whether appellants adequately raised a sufficiency challenge to the jury's finding of no liability for breach of fiduciary duty regarding Sulphur Springs Travelers, L.P. in their motion for new trial. *See*Tex.R. Civ. P. 324(b)(3) (point in motion for new trial that jury finding is against overwhelming weight of the evidence is prerequisite to that complaint on appeal). Appellants also have not raised a sufficiency issue on appeal concerning the jury's finding of no liability for breach of fiduciary duty regarding Sulphur Springs Travelers, L.P.

[14] Having found no liability for breach of fiduciary duty regarding Sulphur Springs Travelers, L.P., the jury did not answer the only damage question relating to that liability issue, which was the amount, if any, Rajpal profited as a result of such a breach. Because appellants received return of their capital contributions in Sulphur Springs Travelers, L.P., a jury question on loss of contractual consideration or out-of-pocket or reliance damages for fraud was not submitted to the jury relating to that investment. In their motion to enter judgment, appellants requested the trial court to award them equitable damages for "ill-gotten gain obtained" by Rajpal.

However, assuming appellants have raised a sufficiency challenge regarding the jury's finding of no liability for breach of fiduciary duty regarding Sulphur Springs Travelers, L.P., we resolve such complaint against appellants. For the reasons discussed above in resolving appellants' second issue, appellants, as limited partners in Sulphur Springs Travelers, L.P., lack standing to assert breach of fiduciary duty claims against limited partner Rajpal. *See Hall,* 380 S.W.3d at 874 ("individual" claims alleged by the limited partner plaintiff belonged to limited partnership and plaintiff lacked standing to bring claims of breach of fiduciary duty against fellow limited partner).

We conclude the trial court did not abuse its discretion by denying appellants' request for equitable damages for breach of fiduciary duty by Rajpal with regard to Greenville Travelers, L.P. or Sulphur Springs Travelers, L.P. We resolve appellants' sixth issue against them.

Election of Remedies

In their third issue, appellants argue that, to the extent the trial court's JNOV was based on their alleged failure to elect remedies, the trial court erred in granting a JNOV. Appellants assert Rajpal's response to their motion for judgment "only called for Appellants to 'make an election of remedies,' and did not seek a judgment on [that] basis." In Rajpal's response to appellants' Motion to Enter Judgment, he argued the damages sought by appellants were "cumulative of all damages found by the jury or as requested by [appellants] on all of [appellants'] claims." Rajpal asserted appellants were required to make an election of remedies to prohibit appellants from obtaining multiple recoveries for the same alleged injuries.

We have concluded the trial court did not err in granting JNOV on appellants' breach of contract, breach of fiduciary duty, and fraud claims. Accordingly, it is unnecessary for us to address appellants' third issue. *See*Tex.R.App. P. 47.1.

Evidence of Damages

In their fourth issue, appellants contend that to the extent the trial court's JNOV was based on inadequate evidence of damages, the trial court erred. Appellants contend they presented "undisputed evidence of the financial harm they sustained" and legally sufficient evidence of damages for breach of contract, fraud, and breach

252 of fiduciary duty. Having concluded*252 the trial court did not err by granting JNOV on appellants' breach of contract, breach of fiduciary duty, and fraud claims, it is unnecessary for us to address appellants' fourth issue. *See*Tex.R.App. P. 47.1.

Attorney's Fees and Interest

In their seventh issue, appellants argue the JNOV should be reversed on their breach of contract claims and they should be awarded attorney's fees as prevailing parties on their breach of contract claims. We have concluded with regard to appellants' second issue that the trial court did not err by granting a JNOV on appellants' breach of contract claims. *See Hall,* 380 S.W.3d at 874. Accordingly, we conclude appellants are not entitled to attorney's fees for breach of contract. *See MBM Fin. Corp. v. Woodlands Operating Co.,* 292 S.W.3d 660, 670 (Tex.2009) (party recovering no damages on breach of contract claim cannot recover attorney's fees under section 38.001(8) of the civil practice and remedies code). Appellants also assert in their seventh issue that if the case is remanded to the trial court for a new trial, they would be entitled to pre-judgment interest. We have resolved appellants' issues against them and concluded the trial court did not err in signing a take-nothing judgment in favor of Rajpal. Accordingly, appellants are not entitled to prejudgment interest.

We conclude appellants are not entitled to attorney's fees or prejudgment interest. We resolve appellants' seventh issue against them.

Conclusion

Having resolved appellants' issues against them, we affirm the trial court's judgment.

No. 07-15-00070-CV
Court of Appeals Seventh District of Texas at Amarillo

Jackson v. Wildflower Prod. Co.

505 S.W.3d 80 (Tex. App. 2016)
Decided Oct 13, 2016

No. 07-15-00070-CV

10-13-2016

Jane Fuller JACKSON, a/k/a Jane Fuller Morris, Appellant v. WILDFLOWER PRODUCTION COMPANY, INC., Appellee

Aubrey J. Fouts, for Wildflower Production Company, Inc. George A. Whittenburg, Mitchell G. Ehrlich, for Jane Fuller Jackson.

Patrick A. Pirtle, Justice

Aubrey J. Fouts, for Wildflower Production Company, Inc.

George A. Whittenburg, Mitchell G. Ehrlich, for Jane Fuller Jackson.

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

OPINION

Patrick A. Pirtle, Justice

This appeal involves conflicting claims of ownership pertaining to an oil and gas royalty interest and right of reversion, as it pertains to certain real property located in Wheeler County, Texas. Appellant, Jane Fuller Jackson, claims ownership of the property in dispute by virtue of a *Mineral Deed Without Warranty* dated November 23, 1993, which was recorded ten days later on December 3, 1993. Appellee, Wildflower Production Company, Inc., claims ownership of those same property interests by virtue of a *Mineral Deed Without Warranty* , from the same grantor, dated seven days later on November 30, 1993, and recorded on December 14, 1993.[1] Both deeds purport to convey, in part, the same property interests, being the property in controversy. Following a bench trial, the trial court found that Wildflower acquired a "superior claim of title" by virtue of being an innocent purchaser for value without actual or constructive notice of Jackson's ownership interest. Jackson contends that Wildflower is not entitled to the protections of an innocent purchaser for value because it acquired its interest by means of a quitclaim deed. Wildflower contends that Jackson waived this claim by failing to assert that argument to the trial court; and, it further contends that, in any event, the conveyance document in question was not a quitclaim deed because it conveyed property, not just the grantor's interests in the property.

[1] Although the deed to Wildflower was recorded subsequent to the recording of the deed to Jackson, that fact is not determinative of any issues in this case.

Finding that Jackson did not waive her claim that Wildflower acquired its interest in the property in controversy via a quitclaim deed and that Wildflower did, in fact, acquire its interest by that means, we conclude the trial court erred in finding Wildflower acquired its interest without notice of the earlier conveyance. Accordingly, we reverse and render, in part, and reverse and remand, in part.

BACKGROUND

On September 14, 1972, R.P. Fuller and wife, Lloyd Elaine Fuller, executed a deed conveying an undivided one-fourth interest in all of the oil, gas, and other minerals in and under and that may be produced from two tracts of land situated in Wheeler County, Texas, to their three children, Rex Fuller, Ann Fuller Cope, and Jane Fuller Jackson. The first tract contained 121.86 acres and the second tract contained 155.4 acres, for a total
84 acreage of 277.26 acres, *84 more or less.[2] Jackson's undivided one-twelfth interest (one-third of one-fourth) in the oil, gas, and other minerals in and under and that may be produced from this acreage is the property in controversy in this case.

2 The deed from R.P. and Lloyd Elaine Fuller to their three children described the property as follows:

First Tract: Being a part of the Thomas James 1/3 League of land, described by metes and bounds as follows:

BEGINNING At the NW comer of the J.F. Alexander tract out of the SE comer of said Thomas James Survey; THENCE North 9 deg. 46 min. East 1336.55 feet to point for corner; THENCE East 1110.3 feet to a point for corner; THENCE North 1320 feet to a point for corner; THENCE East 1401.7 feet to a point on the West line of Section No. 1, Cert. 75, C & M RR Co. Survey, for the Northeast corner of this tract; THENCE South with the West line of said Section No. 1, Cert. 75, C & M RR Co. Survey, 2640 feet to a point on the west line of said Sec. 1, Cert. 75, C & M RR Co. Survey, and a point on the East line of Thomas James 1/3 League of land for SE corner of this tract; THENCE West 2721.7 feet to the place of beginning, and containing 121.86 acres of land.

Second Tract: Being a part of Section 1, Cert. 75, Abst. No. 112, original grantee, C & M RR Co. Patent No. 171, Vol. 55, dated October 23, 1880, described by metes and bounds as follows:

BEGINNING At the NE comer of the J.F. Alexander 160 acre tract of land out of the South part of said Sec. 1, C & M RR Co. Survey; THENCE West 2558.3 feet to a point for the SW corner of this tract; THENCE North 2640 feet to a point for the NW corner of this tract; THENCE East 2558 feet to a point for the

> NE corner of this tract on the East boundary line of Sec. 1, Cert. 75, C & M RR Co. Survey; THENCE South 2640 feet to the East line of said Sec. 1, Cert. 75, C & M RR Co. Survey, to the place of beginning, containing 155.4 acres of land;
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> Both tracts containing 277.26 acres of land, more or less, and situated in Wheeler County, Texas.

On April 7, 1977, the three Fuller children and others, executed an *Oil, Gas & Mineral Lease* covering these two tracts in favor of W.R. Gray & Associates. The lease was for a primary term of three years and as long thereafter as oil, gas, or other minerals were produced from the property. The lease provided for the payment of a three-sixteenth (3/16) royalty, proportionately reduced to the interest owned by each party. The lease also contained a pooling clause authorizing the formation of a 640-acre unit for the production of gas. W.R. Gray & Associates subsequently assigned the lease to Grace Petroleum Corporation, who then executed a *Designation of Gas Unit* , placing the mineral interests the subject of the earlier lease into a gas unit known as the No. 1 C.A. Stein Unit. Thereafter, the lease became a part of a pooled unit. Under the terms of the pooling agreement, all royalties were payable in proportion to the acreage each tract bore to the total acreage in the 640-acre unit. During the primary term of the lease, a gas well (the "Stein Well") was drilled and completed within the pooled unit.

On June 15, 1990, Rex Fuller, Jackson, Lydick-Jackson Joint Venture, and others, as grantors, executed a deed of trust in favor of John C. Sims, as Trustee for the First National Bank at Lubbock,[3] to secure payment of a debt in the original principal amount of $1,000,000. That same day, Cope, Lydick-Jackson Joint Venture, and others, as grantors, also executed a deed of trust in favor of Sims, as Trustee for the Bank, to secure an indebtedness in the original principal amount of $250,000. The two deeds of trust encumbered the ownership interests of the
85 grantors in various *85 tracts of real property located in the following Texas Counties: Carson, Lipscomb, Wheeler, Hemphill, Hansford, Ochiltree, Fayette, Archer, Roberts, Reeves, Brazoria, Hutchinson, Hockley, Cochran, and Moore. Although the legal description used in the two deeds of trust did not track the legal description of the 277.26 acres described in the deed from R.P. and Lloyd Elaine Fuller to their three children, all parties agree that the property interest described in the deeds of trust encompassed Jackson's property interest in that acreage. On September 7, 1993, as a result of a subsequent default in payment on the notes secured by the two deeds of trust, the Bank foreclosed upon the grantor's property interests in the various tracts of property. FBGA Financial Services, Inc., the Bank's nominee and agent, purchased the property for the benefit of the Bank and received a separate Substitute Trustee's Deed with respect to each deed of trust.

> [3] First National Bank at Lubbock was subsequently known as the First National Bank of West Texas. For purposes of this opinion, we will refer to the entity simply as the "Bank."

Prior to foreclosure, the Bank had agreed to not seek a deficiency judgment against any of the Fuller children, and subsequent to the foreclosure, Leete Jackson III, Jane Fuller Jackson's husband, consummated an arrangement with the Bank to purchase her former interest (being the property in controversy) from the interest the Bank obtained through foreclosure. Pursuant to that agreement, on November 23, 1993, FBGA executed and delivered a quitclaim instrument, entitled *Mineral Deed Without Warranty* , conveying to Leete the Bank's interest in the property in controversy.[4] In this document, the 277.26 acres were described by

the same metes and bounds description used in the September 14, 1972 deed from R.P. Fuller and Lloyd Elaine Fuller to their children. This instrument was subsequently recorded in the official property records of Wheeler County on December 3, 1993.

[4] Leete Jackson III, died November 2, 1997. Jane Fuller Jackson claims ownership of his interests by way of inheritance.

During this same period of time, the Bank was also negotiating with Rex to sell some of the property interest the Bank intended to acquire at foreclosure. Relevant to this dispute, Rex consummated those negotiations by agreeing with the Bank that Wildflower, a corporation owned and controlled by Rex, would purchase a portion of the property interest the Bank obtained through foreclosure of the two deeds of trust. Pursuant to that agreement, on November 30, 1993, FBGA executed and delivered to Wildflower an instrument entitled *Mineral Deed Without Warranty* , purporting to convey to Wildflower whatever property interest the Bank acquired through foreclosure in and to all or part of seven sections of property located in Wheeler County, Texas. This instrument was subsequently recorded in the official property records of Wheeler County on December 14, 1993, and provided, in relevant part, as follows:

> FBGA Services, Inc., ... does hereby grant, bargain, sell, convey, transfer, assign and deliver unto WILDFLOWER PRODUCTION COMPANY, INC., ... a portion of the Grantor's right, title, interest, estate, and every claim and demand, both at law and in equity, in and to that part of the oil, gas and other minerals in and under and that may be produced from the following described lands situated in Wheeler County, State of Texas, being more particularly described in Exhibit "A" attached hereto and made a part hereof for all purposes whatsoever, being that interest previously owned by ANN FULLER LYDICK CLAYTON aka ANN FULLER aka
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> 86 *86
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> MARGARET ANN FULLER aka ANN FULLER LYDICK aka MARGARET FULLER LYDICK aka ANN FULLER COPE aka MARGARET ANN COPE and LYDICK-JACKSON JOINT VENTURE aka COPE-JACKSON JOINT VENTURE ... and JANE JACKSON FULLER aka FRANCES JANE FULLER aka FRANCES JANE JACKSON ..., together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas and other minerals, and storing, handling, transporting and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements.

The acreage described in Exhibit "A" included the 277.26 acres previously deeded to Leete. Although Exhibit "A" did not include the specific metes and bounds description used in the deed to Leete, it does include the description of a larger tract which encompasses that acreage.[5] As a result of these two instruments, the Bank transferred its interest in the 277.26 acres twice—first to Leete and

subsequently to Wildflower. This apparently inadvertent double-deeding of that acreage is the genesis of the dispute in this case.

[5] The property description in Wildflower's deed tracks the property description in the Substitute Trustee's Deed; whereas, the property description in Leete's deed tracks the deed from R.P. Fuller and Lloyd Elaine Fuller. Although different property descriptions were used, the parties agree both deeds purport to convey the property in controversy.

At trial, conflicting testimony was given as to whether Rex was aware that the Bank had already transferred the mineral interest formerly owned by Jackson to Leete when he negotiated the purchase of the remaining mineral interest by Wildflower. John C. Sims, the Bank's attorney who drafted the November 23, 1993 deed to Leete,[6] testified that prior to the execution of the deed to Wildflower on November 30, 1993, Rex was aware that Leete had previously acquired the mineral interest formerly owned by Jackson and that Rex knew Wildflower would not be acquiring that interest. On the other hand, Rex testified that he did not know about the November 23, 1993 deed until June of 2011.

[6] Despite the striking similarity of the deeds, Sims testified that he did not prepare the November 30, 1993 deed to Wildflower Production. According to Sims's testimony, Rex Fuller brought the Wildflower deed with him to the closing.

From 1993 until 2011, Wildflower received and consistently accepted, without exception or objection, royalty payments from the Stein Well based upon a property interest that did not include the mineral interest formerly owned by Jackson. Furthermore, the record reflects that from 2002 until 2011, Jackson received royalty payments from the Stein Well in an amount equal to the exact mineral interest Leete had purchased from the Bank pursuant to the November 23, 1993 deed.[7]

[7] The record is unclear as to who received royalty payments from the Stein Well during the period from November 23, 1993 until 2002.

In 2010, Linn Energy, Inc. started a drilling program on real property included within the 640-acre Stein Unit. Pursuant to that program, Linn Energy drilled, completed, and began production on another gas well (the "Stein 1-3H Well"). A division order title opinion pertaining to the Stein 1-3H Well, prepared in January of 2011 by legal counsel for Linn Energy, raised for the first time an issue with respect to the ownership of the mineral interest purchased by Leete, being the
87 property in *87 controversy. Because the November 23, 1993 deed to Leete was not recorded until after execution of the November 30, 1993 deed to Wildflower, the title examiner required both parties to agree and sign off on a stipulation concerning their respective interests.

When agreement could not be reached, Wildflower filed suit pursuant to the Uniform Declaratory Judgments Act,[8] contending it was the rightful owner of the property in controversy by virtue of being an innocent purchaser for value, without notice of any existing claim to the property. Wildflower sought a declaration that it solely owned the disputed property and that the November 23, 1993 deed to Leete was void. It also sought recovery of reasonable and necessary attorney's fees. By her *Original Answer* , Jackson sought a counter-declaration that she owned superior title by virtue of the earlier deed. She also sought recovery of her reasonable and necessary attorney's fees.

[8] *See* Tex. Civ. Prac. & Rem. Code Ann.§§ 37.001 -37.011 (West 2015 and Supp. 2016).

Prior to trial, the parties stipulated that the only fact issues to be determined were: (1) whether Wildflower had actual or constructive notice of the November 23, 1993 deed to Leete, on November 30, 1993, and (2) whether Wildflower Production

was a "bona fide purchaser of the interest in dispute." The parties presented evidence and arguments to the court on February 10, 2014. At the conclusion of the hearing, the court gave counsel an opportunity for additional briefing and took the matter under advisement. On January 8, 2015, the court entered judgment finding that the November 30, 1993 deed to Wildflower conveyed "superior title in the mineral/royalty interest conveyed." The Final Judgment entered also stated, albeit incorrectly, that the deed to Wildflower was recorded *prior* to the deed to Leete. On January 28, 2015, the court entered *Findings of Fact and Conclusions of Law* , wherein it correctly found that the Wildflower deed was recorded *subsequent* to the deed to Leete. Additionally, the court found that Wildflower paid value for the disputed property and that it acquired that property "without notice, actual or constructive, of the conveyance to Leete Jackson, III." In further support of its judgment, the court concluded that the November 30, 1993 deed to Wildflower was not a quitclaim deed and that Jackson had waived any claim that the conveyance was a quitclaim deed by failing to include "an issue related to the character of the conveyance" in the stipulation agreed to by the parties.[9] Jackson filed a timely notice of appeal.

[9] The stipulation of the parties was not made in open court and entered of record, nor does it appear in the clerk's record.

ISSUES PRESENTED

Jackson contends the November 30, 1993 deed to Wildflower is a quitclaim deed, as a matter of law, and that the trial court erred in finding otherwise. She also contends the trial court erred, as a matter of law, in finding that she waived her claim that the deed to Wildflower was a quitclaim deed. Wildflower contends its deed is not a quitclaim deed, although it concedes that construction of the deed is a question of law. Wildflower also contends the trial court did not err in finding the deed in question to be a conveyance of title rather than a quitclaim deed.

CONVEYANCES

In Texas, interests in real property transfer upon execution of an instrument of conveyance evidencing the grantor's intent to convey, executed and legally delivered to the grantee. By statute, an
88 instrument *88 of conveyance must be in writing and must be subscribed and delivered by the grantor or the grantor's agent. TEX. PROP. CODE ANN. § 5.021 (West 2014).[10] Three common instruments of conveyance are at issue in this case: (1) deeds, (2) quitclaim deeds, and (3) mineral leases.[11]

[10] "A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing." Tex. Prop. Code Ann.§ 5.021 (West 2014). Unless otherwise designated, all references to "section" or "§" are to the Texas Property Code.

[11] Texas law has long recognized that an oil and gas lease is not a "lease" in the traditional sense of a lease of the surface of real property. *Natural Gas Pipeline Co. of America v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003). Rather, "[i]n a typical oil and gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee." *Id.* (citing *W.T. Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27, 28–29 (Tex. 1929)). As a result, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease. *Id.*

> For a deed or instrument to effect conveyance of real property, it is not necessary to have all the formal parts of a deed formerly recognized at common law or to contain technical words. If, from the whole instrument, a grantor and grantee can be ascertained, if there are operative words or words of grant showing an intention of the grantor to convey title to a real property interest to the grantee, and if the instrument is signed and acknowledged by the grantor, it is a deed that is legally effective as a conveyance.

Masgas v. Anderson , 310 S.W.3d 567, 570 (Tex. App.–Eastland 2010, pet denied).

An instrument of conveyance of an interest in real property conveys a fee simple estate unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or by operation of law. § 5.001(a). An absolute or "fee simple" estate is one entitling the owner to the benefits of that estate during his life and descending to his heirs, devisees, and legal representatives on his death. *Field v. Rudes* , 204 S.W.2d 1, 4 (Tex. Civ. App.–El Paso 1947), *rev'd on other grounds* , 146 Tex. 133, 204 S.W.2d 5 (1947). One can own a fee simple estate in both legal and equitable property interests. *Id.* Since February 5, 1840, words previously necessary at common law to transfer a fee simple estate have not been necessary. § 5.001(a), (b). Texas courts have long recognized that "the form of the instrument is of no moment if it manifests the intention of the grantor to convey to the grantee the entire title by the very terms of the instrument itself." *Baker v. Westcott* , 73 Tex. 129, 11 S.W. 157, 158 (1889) ; *White v. Brookline Trust Co.* , 371 S.W.2d 597, 599 (Tex. Civ. App.–Amarillo 1963, writ ref'd n.r.e.) (holding that "inaccuracy of expression or the inaptness of the words used in the instrument are not fatal if the intention to pass title can be discovered from a careful consideration of the instrument as a whole and the surrounding circumstances, or the instrument manifests by its term the intention of the grantor to convey to the grantee").

DEEDS V. QUITCLAIM DEEDS

As already stated above, title to real property (whether fee simple or otherwise) transfers upon execution of a document evidencing the grantor's intent to convey, executed and legally delivered to the grantee. Both deeds and quitclaim deeds convey the grantor's interest in the property described to the grantee. What typically distinguishes a deed from a quitclaim deed is that
89 the granting clause in a deed *89 purports to grant and convey the described property, whereas the granting clause in a quitclaim deed only purports to grant and convey whatever "right, title, and interest" the grantor has in that property at the time the instrument is executed and delivered. *See Cook v. Smith* , 107 Tex. 119, 174 S.W. 1094, 1095 (Tex. 1915) (holding that a quitclaim deed conveys whatever interest the grantor owns without warranting or professing that the title is valid); *Geodyne Energy Income Prod. P'ship I – E v. Newton Corp.* , 161 S.W.3d 482, 485 (Tex. 2005) ; *Enerlex, Inc. v. Amerada Hess, Inc.* , 302 S.W.3d 351, 354 (Tex. App.–Eastland 2009, no pet.) ; *South Plains Switching v. BNSF Ry. Co.* , 255 S.W.3d 690, 707 (Tex. App.–Amarillo 2008, pet. denied).

Effectively, a quitclaim deed is only a release and assignment of the grantor's claims to the property because it contains no covenant of seisen or representation of title in the grantor.[12] *Diversified, Inc. v. Hall* , 23 S.W.3d 403, 407 (Tex. App.–Houston [1st Dist.] 2000, pet. denied). By itself, a quitclaim deed does not establish any title in the grantee but instead merely passes the interest of the grantor in the property described. *Rogers v. Ricane Enters.* , 884 S.W.2d 763, 769 (Tex. 1994). "A quitclaim deed does not *of itself* establish any title in those holding under it. The quitclaim passes the interest of the grantor in the property, and for the quitclaim to be a conveyance, title in

the grantor must be shown." *Abraham v. Crow* , 382 S.W.2d 756, 758 (Tex. Civ. App.–Amarillo 1964, no writ) (quoting *McMahon v. Fender* , 350 S.W.2d 239, 240 (Tex. Civ. App.–Waco 1961, writ ref'd n.r.e.) (emphasis in original)). In other words, for a quitclaim deed to serve as a conveyance of title, the grantor must hold title to the property itself.

[12] A covenant of seisin is an assurance to the grantee that the grantor actually owns the property being conveyed, in the quantity and quality which he purports to convey, and it is breached if the grantor does not own the estate that he undertakes to convey. *Reyes v. Booth*, No. 11–00–00391–CV, 2003 WL 21663708, at *2, 2003 Tex. App. LEXIS 6148, at *2 (Tex. App.–Eastland March 27, 2003, no pet.) (mem. op.). In the absence of any qualifying expression, a covenant of seisin is read into every conveyance of land or an interest in land, except a quitclaim deed. *Id.*

Typically, a quitclaim deed is used when the interest of the grantor is unknown or uncertain and the grantor wants to limit or extinguish potential liability arising from any claim the grantee might assert against the grantor pertaining to the grantor's ownership interest. "Quitclaim deeds are commonly used to convey 'interests of an unknown extent or claims having a dubious basis,' " such as an interest acquired by virtue of a sheriff's deed or a trustee's deed following foreclosure. *See Geodyne* , 161 S.W.3d at 486 (quoting *Porter v. Wilson* , 389 S.W.2d 650, 654–55 (Tex. 1965)). *See also Hall* , 23 S.W.3d at 407 (constable's deed conveying "all of the estate, right, title and interest which the said [judgment debtor] had" found to be a quitclaim deed).

The nature of a given instrument as a conveyance of property versus a conveyance of the grantor's interest only is to be determined from the intent of the grantor as determined by the "four corners" of the document and the circumstances surrounding its execution and delivery. *Brookline Trust Co.* , 371 S.W.2d at 599 (stating that the "inaccuracy of expression or the inaptness of the words used in the instrument are not fatal if the intention to pass the title can be discovered from a careful consideration of the instrument as a whole and the surrounding circumstances"). In deciding whether an instrument conveys the property itself or merely *90 the grantor's rights in that property, courts seek to determine the intent of the parties. *Geodyne,* 161 S.W.3d at 485 ; *Enerlex,* 302 S.W.3d at 354. What is important and controlling is not whether the grantor actually conveyed title to the property, but whether the instrument purports to convey the property described or the grantor's interest in that property. *Enerlex* , 302 S.W.3d at 355 (citing *Am. Republics Corp. v. Houston Oil Co. of Texas* , 173 F.2d 728, 734 (5th Cir. 1949)); *Cook* , 174 S.W. at 1096.

If, when taken as a whole, the instrument discloses a purpose to convey the property itself, and not merely a transfer of the grantor's interest, it will be given the effect of a deed, even though it may have some characteristics of a quitclaim. Conversely, if the instrument, taken as a whole, indicates the grantor's intent to merely transfer whatever interest the grantor may own, it will be treated as a quitclaim deed.

TEXAS RECORDING STATUTE

At common law, in cases in which equities were equal, the rule concerning superior title between adverse claimants of the same property was found in the Latin maxim "*qui prior tempore potior est jure,"* which means "he who is first in time is preferred in right." *Neslin v. Wells* , 104 U.S. 428, 441, 26 L.Ed. 802 (1881). At common law, there is no requirement that an instrument of conveyance be registered or recorded in order to effectuate a transfer of title. The necessity of registering or recording an instrument of conveyance, as well as its effect, is purely a creature of legislative prerogative.[13] In Texas, insofar as it pertains to the transfer of title to real property, this common law rule of not requiring

recordation was partially abrogated by the enactment of the Texas recording system. Now found in the provisions of the Texas Property Code, section 13.001 provides, in part, as follows:

13 "Our system of registration was unknown to the common law. It is purely statutory." *Ball v. Norton*, 238 S.W. 889, 890 (Tex. Comm'n App. 1922, judgm't adopted).

> (a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.
>
> (b) The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

§ 13.001(a).

Under this "notice" system, which has been in place in Texas in one form or another since 1830, the grantee under a later deed will prevail over the grantee in a prior unrecorded deed of the same property, unless the subsequent purchaser had notice of the prior unrecorded conveyance. *See Houston Oil Co. v. Kimball* , 103 Tex. 94, 122 S.W. 533, 536 (Tex. 1909) (holding that, under the recording statute in effect in 1838, subsequent purchaser for value and without actual or constructive notice of prior conveyance held superior title over grantee of unrecorded prior deed); *Hall* , 23 S.W.3d at 406 (finding that holder of a later title will have priority over the holder of an earlier title if it is shown that the holder of the later title acquired it as an innocent purchaser for value without notice of the earlier interest).*See also Gibraltar Sav. Ass'n v. Martin* , 784 S.W.2d 555, 557 (Tex. App.–Amarillo 1990, writ denied) (finding that "[t]his statute, through various

91 transmutations in enumeration, *91 has been a part of our jurisprudence since before Texas was a state" and that previous statutes have been so similar in all material respects to the present statute as to make decisions under those predecessor statutes relevant to any current analysis). This notice system protects a subsequent purchaser who acquires an interest in real property without notice of a prior unrecorded conveyance. Under the Texas statute, a subsequent grantee who acquires an interest in real property by paying valuable consideration and who is without notice of the prior grant, does not have to record the subsequent conveyance in order to prevail over the prior grantee.

EFFECT OF A QUITCLAIM DEED ON INNOCENT PURCHASER STATUS

Since 1871, courts of this State have considered it "settled law" that a party receiving a quitclaim deed to land cannot avail himself of the defense of an innocent purchaser for value without notice. *See Richard son v. Levi* , 67 Tex. 359, 3 S.W. 444, 446 (1887) (recognizing the rule as being "first authoritatively announced" in *Rodgers v. Burchard* , 34 Tex. 441 (1871)). *See also Cook* , 174 S.W. at 1095–96. Because the grantee in a quitclaim deed receives only whatever right, title, interest, or claim the grantor had, "[a] quitclaim deed conveys upon its face doubts about a grantor's interest and a buyer is necessarily put on notice as to those doubts." *South Plains Switching Ltd* ., 255 S.W.3d at 707. As such, the grantee under a quitclaim deed is deemed to be on notice of all legal or equitable claims, recorded or unrecorded, existing in favor of a third-party at the time the quitclaim deed was delivered. *Woodward v. Ortiz* , 150 Tex. 75, 237 S.W.2d 286, 291–92 (1951) ; *Tate v. Kramer* , 1 Tex.Civ.App. 427, 23 S.W. 255, 257 (Tex. Civ. App.–Austin 1892, no writ) (holding that a quitclaim grantee is on notice of all other claims to the property). The question is not one of being merely put on inquiry; the notice is absolute and conclusive as to all claims. Simply stated, as a

matter of law, the grantee under a quitclaim deed takes the property subject to all adverse legal and equitable claims affecting title to the property and cannot be an innocent purchaser because the deed itself places the grantee on notice that there may be superior claims to title.

BRYAN V. THOMAS

Wildflower relies heavily on the 1963 Texas Supreme Court opinion in *Bryan v. Thomas* to advocate its position that the instrument in question is not a quitclaim deed and that it is entitled to the status of an innocent purchaser for value. *See Bryan v. Thomas* , 365 S.W.2d 628 (Tex. 1963). As to the first position, Wildflower compares the granting clause of both instruments and concludes that because the granting clauses are similar, the instrument in question must be something other than a quitclaim deed simply because the instrument in *Bryan* was something other than a quitclaim deed. This is a logical fallacy. Just because the two deeds may contain similar wording does not alone mean that the deed in controversy is not a quitclaim deed.

It is clear that the Supreme Court did not interpret the instrument in question in *Bryan* to be a quitclaim deed. *Id.* at 630 (stating "[t]he deed under consideration here from Mrs. Bryan to Thomas is *more than a quitclaim deed* " (emphasis added)). However, when comparing the conveyance instrument in *Bryan* to the conveyance instrument in this case, Wildflower ignores vital distinguishing characteristics. The most significant difference between the deed in this case and the deed in *Bryan* is that the deed in
92 *Bryan* contained *92 a general warranty clause—an express guaranty of seisin. A covenant of seisin is an assurance to the grantee that the grantor owns the very estate in the quantity and quality which he purports to convey.[14] In *Bryan,* because the deed purported to convey all of the grantor's interest in a particular tract of land and because the grantor warranted title to that property, the court found that the instrument fairly implied an intent to convey the land itself—not just the grantor's rights in that property. As a result, the instrument in *Bryan* was held not to be quitclaim deed.

14 "[T]he intention of a covenant of seisin, as uniformly expounded in the English law, is only to indemnify the grantee for the consideration paid ...." *Wiggins v. Stephens*, 191 S.W. 777, 778 (Tex. Civ. App.–Amarillo 1917, no writ).

Despite this very clear distinction that *Bryan* was not dealing with a quitclaim deed, Wildflower then focuses in on a single sentence wherein Justice Culver wrote:

> [t]o remove the question from speculation and doubt we now hold that the grantee in a deed which purports to convey all of the grantor's undivided interest in a particular tract of land, *if otherwise entitled* , will be accorded the protection of a bona fide purchaser.

Bryan , 365 S.W.2d at 630 (emphasis added). Wildflower focuses on the language "purports to convey all of the grantor's undivided interest," and ignores the "if otherwise entitled" language. Notwithstanding the distinguishing fact that the deed in *Bryan* contained a warranty clause and the court found it to be something other than a quitclaim deed, Wildflower asks this court to accept the over-simplified proposition that the grantee in a deed that purports to convey "all of the grantor's undivided interest" is *ipso facto* entitled to the protections of an innocent purchaser. That simply is not what the court held in *Bryan* .

Since *Bryan,* courts and commentators have discussed and debated what the Supreme Court meant by the phrase "if otherwise entitled." *See* H. Martin Gibson, *The Perils of Quitclaims,* 25-4 Texas Oil and Gas Law Journal 1 (2011). Under Wildflower's interpretation, "if otherwise entitled" would have to refer to a subsequent grantee's superior position under the Texas Recording

Statute. Under this interpretation, the *Bryan* opinion would have to be read as overruling over one hundred and thirty years of precedent, including the seminal 1915 case of *Cook v. Smith* , concluding that a quitclaim deed puts the grantee on notice of defects in the grantor's title. But this simply cannot be the case because the very next sentence in *Bryan* states that the court's opinion "finds full support in *Cook v. Smith* ." 365 S.W.2d at 630.

In *The Perils of Quitclaims,* H. Martin Gibson posits an alternative interpretation that finds support by subsequent courts and commentators.[15] If the phrase "if otherwise entitled" is interpreted instead to refer to an instrument of conveyance that constitutes more than a mere quitclaim deed, then *Bryan* can be understood as highlighting the fact that the usage of *93 quitclaim-like granting language (such as "all of my right, title, and interest") is not the litmus test for determining whether a particular instrument is a quitclaim. In such instances, a court must delve deeper into the instrument itself to determine if there are other vestiges of a quitclaim—such as the absence of a covenant of seisin or a warranty of title. In *Bryan* , the court found other indicia of an intent to convey the land itself and, accordingly, found the instrument in question to be "more than a quitclaim deed," thereby entitling the grantee to the protections of an innocent purchaser. *See Porter* , 389 S.W.2d at 655 (holding that "[i]n cases where the courts have construed an instrument employing the words, 'all my right, title and interest' as one purporting to convey the land itself, they have found some wording in the instrument which evidenced an intention to convey the land itself rather than the right, title and interest of the grantor").

93

15 *See* F. Walter Conrad, *Property—Deeds—Notice—Quitclaim Redefined in a Restricted Manner for the Purposes of Notice under the Recording Acts,* 41 Tex. L. Rev. 939, 941-42 (1963) (stating "[t]he court in [*Bryan v. Thomas*] did not intend to confine its opinion to deeds involving only the phrase "undivided interest" but rather addressed itself to all deeds combining quitclaim language, such as "all my right, title and interest," with a general warranty clause or words of conveyance normally found in warranty deeds. The court said in effect that if an instrument contains such dual elements it will not be regarded as a quitclaim."

The language from *Bryan* relied upon by Wildflower has never been cited to support the proposition now being made—that a grantee in a quitclaim deed is entitled to the protections accorded an innocent purchaser.[16] Accordingly, we decline to follow the position being advocated by Wildflower based upon its interpretation of *Bryan v. Thomas* , and we adhere to the long-held principle that a quitclaim deed does not entitle a grantee to the protections of an innocent purchaser.

16 In its fifty-three year history, *Bryan v. Thomas* has only been cited *one* time on the issue of whether a grantee was entitled to bona fide purchaser status. In *Penny v. Adams,* 420 S.W.2d 820 (Tex. Civ. App.–Tyler 1967, writ ref'd) the court held that the grantee in an instrument bearing "no legal distinction" to the deed in *Bryan* was entitled to bona fide purchaser status.

STANDARD OF REVIEW

Our analysis of the applicable standard of review in this case should begin with a discussion of the issue concerning whether Jackson waived her claim that Wildflower was not entitled to the protections of an innocent purchaser for value. In its *Findings of Fact* , the trial court found as follows:

> 7. The parties stipulated in an Agreement, pursuant to Rule 11 of the Texas Rules of Civil Procedure, that the only issues to be determined by the Court for the entry of a Final Decree in this proceeding were:
>
> a. Whether Wildflower Production Company, Inc. had actual or constructive notice of the outstanding unrecorded conveyance to Leete Jackson, III at the time of the conveyance to Wildflower Production Company, Inc.
>
> b. Whether Wildflower Production Company, Inc. was a bona fide purchaser of the interest in dispute.

The parties do not dispute this finding of fact. Where they disagree is with respect to the trial court's *Conclusions of Law* wherein the court found that Jackson "waived any claim that the conveyance to Wildflower Production Company, Inc. was a quit claim conveyance" as a result of this stipulation.

In reviewing the trial court's ruling, we afford great deference to its findings of fact, particularly if based on credibility determinations, when those findings are supported by the record. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.* , 341 S.W.3d 323, 337 (Tex. 2011). On the other hand, "[a] trial court's conclusions of law are always reviewable." *Tex. Student Hous. Auth. v. Brazos County Appraisal Dist.* , 440 S.W.3d 779, 786 (Tex. App.–Amarillo 2013), *rev'd on other grounds* , 460 S.W.3d 137 (Tex. 2015) (citing *Westech Eng'g, Inc. v. Clearwater Constructors, Inc.* , 835 S.W.2d 190, 196 (Tex. App.–Austin 1992, no writ)). *94 Because a trial court has no discretion in determining whether to apply appropriate legal principles, we review a trial court's conclusions of law *de novo*. *See Okorafor v. Uncle Sam & Assocs.* , 295 S.W.3d 27, 38 (Tex. App.–Houston [1st Dist.] 2009, pet. denied). Because this standard controls when we review the trial court's legal conclusions, it controls the trial court's decision whether the instrument in question was a quitclaim deed. As such, it also controls the trial court's ultimate decision whether Wildflower was entitled to the protections of an innocent purchaser for value.

Here, because the parties agreed that the trial court would determine whether Wildflower was an innocent purchaser of the property in controversy, they implicitly agreed the trial court would determine whether the instrument in question was a quitclaim deed. Accordingly, because, as a matter of law, the trial court would have to determine whether the instrument in question was a quitclaim deed in order to determine Wildflower's innocent purchaser status, we conclude that Jackson did not waive that issue.

ANALYSIS

Based on the foregoing discussion of the law applicable to quitclaim deeds and innocent purchaser status, it is clear that the decision in this case turns squarely upon the construction to be given to the *Mineral Deed Without Warranty* from FBGA Services, Inc., as grantor, to Wildflower, as grantee, dated November 30, 1993. If that conveyance is a quitclaim deed, then Wildflower is not entitled to innocent purchaser for value status; whereas, if it is not a quitclaim deed, then it is entitled to avail itself of the benefits accruing from that status.

In the analysis of the instrument in question, if anything can be said with certainty, it would be that the instrument was poorly drafted. It is titled a "Mineral Deed Without Warranty," yet the body of the instrument does not expressly mention or discuss anything about whether the conveyance is or is not covered by a warranty of title. While the instrument does not conform to a typical quitclaim deed, it does have many characteristics that are common to such an instrument. The granting clause describes a "portion" of the grantor's "right, title, and interest" in and to a "part" of the oil, gas, and other minerals in and under and that may be produced from certain lands described in Exhibit

"A," situated in Wheeler County, Texas. Furthermore, the instrument neither defines the "portion" nor the "part" conveyed other than to say that the interest described in Exhibit "A" was previously owned by Jackson and others. Missing is any express covenant of seisin or statement that the property interest described is actually owned by the grantor, FBGA. What the instrument does do is convey to the grantee whatever "right, title, interest, estate, and every claim and demand, both at law and in equity" the grantor might own. Other courts have described this language as "the essence of a quitclaim deed." *Ricane Enters.* , 884 S.W.2d at 769 (stating that a quitclaim deed is a deed of conveyance intending to pass any title, interest, or claim of the grantor, but not professing that the grantor owns title or that such title is valid). The quintessential character of a quitclaim deed is that the grantor makes no covenant of seisin—no representation or claim of ownership; instead, passing only what interest, if any, the grantor may have possessed.

Because the conveyance instrument from FBGA to Wildflower, when taken as a whole, (1) conveyed only "the Grantor's right, title, interest, and estate," (2) contained no covenant of seisin, (3) included no warranty of title, and (4) otherwise
95 did *95 not express an intent to convey the property itself, we conclude it to be a quitclaim deed. Furthermore, because the instrument in question is a quitclaim deed, as a matter of law, Wildflower cannot avail itself of the protection afforded an innocent purchaser for value, without notice. *See Hall* , 23 S.W.3d at 407 (holding that grantee received nothing more than a chance at title because it received only whatever right, title, interest, or claim grantor had, which was nothing); *Woodward* , 237 S.W.2d at 291 (stating purchaser under a quitclaim deed could not enjoy protection of an innocent purchaser); *Smith v. Morris and Co.* , 694 S.W.2d 37, 39 (Tex. App.–Corpus Christi 1985, writ re'd n.r.e.) (stating grantee in a quitclaim deed takes with notice of all defects in the grantor's title). Finally, because Wildflower is not entitled to the protections of an innocent purchaser for value, its interest in the property in controversy, if any, is subject to all existing claims.

Based on the above and foregoing, we find the trial court erred by construing the conveyance instrument in question as anything other than a quitclaim deed, and based on that conclusion, we find that, as a matter of law, Wildflower was not an innocent purchaser for value. Because the deed to Jackson was prior in time and, therefore, right to the deed to Wildflower, the trial court erred in finding that Wildflower had "superior title" to the property in controversy. We sustain Jackson's issues.

CONCLUSION

The judgment of the trial court is reversed and judgment is rendered declaring that Jackson owns and holds superior title to the property in controversy, including all oil, gas, and mineral interests in and under and that may be produced from the 277.26 acres described in the quitclaim deed dated November 23, 1993 from FBGA, as grantor, to Leete Jackson III, as grantee. Because the trial court did not address additional relief requested by Jackson, this matter is further reversed and remanded to the trial court for the purpose of disposing of Jackson's claims concerning monies held in suspense and the recovery of reasonable and necessary attorney's fees pursuant to the applicable provisions of the Texas Civil Practice and Remedies Code.[17]

17 *See* Tex. Civ. Prac. & Rem. Code Ann.§ 37.009 (West 2015).

No. 97-0729
Supreme Court of Texas

KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.

988 S.W.2d 746 (Tex. 1999)
Decided Mar 25, 1999

No. 97-0729.

Argued on October 20, 1998.

Decided March 25, 1999.

Appeal from the 71st Judicial District Court, Harrison County, Bonnie Leggat, J. *747

Timothy W. Mountz, Dallas, Jane A. Nenniger, Macey Reasoner Stokes, Houston, for Petitioner.

Gregory P. Grajczyk, Milbank, SD, James W. Hill, Longview, for Respondent.

Justice ENOCH delivered the opinion of the Court.

We are asked to decide whether Harrison County Housing Finance Corporation's (HCH) claims against KPMG Peat Marwick, LLP for violations of the Deceptive Trade Practices Act and negligence are barred by the two-year statute of limitations. The trial court granted summary judgment for Peat Marwick on all of HCH's claims. But the court of appeals reversed the trial court's summary judgment on the DTPA and negligence claims and remanded these for trial.[1]

[1] 948 S.W.2d 941.

Applying the discovery rule, the court of appeals held that neither claim was time-barred. It reasoned that Peat Marwick had not presented conclusive evidence that HCH discovered or in the exercise of reasonable diligence should have discovered the wrongful act which allegedly caused its injury more than two years before HCH filed suit.[2]

[2] *Id.* at 947.

To the contrary, we conclude that Peat Marwick has conclusively established that HCH's claims against Peat Marwick accrued more than two years before suit was filed. Accordingly, we reverse the court of appeals' judgment on both the DTPA and negligence claims and render judgment that HCH take nothing.

From 1980 to 1990, Peat Marwick provided accounting and auditing services to HCH for a series of bonds HCH had issued. In addition, Peat Marwick was to ensure that the trustee for the bonds, First Interstate Bank of California, complied with the trust indenture.

Under the trust indenture, one of First Interstate's duties as trustee was overseeing a capital reserve fund established to pay principal or to redeem bonds. And during the period of the auditing services, specifically in 1985, First Interstate hired, on its own behalf, a partner from Peat Marwick to prepare a special procedures report about the trust assets. But Peat Marwick did not tell HCH about this dual representation.

On February 1, 1993, HCH filed suit against First Interstate and one of its shareholders, alleging breach of fiduciary duty, breach of contract, negligence, and gross negligence. HCH alleged that in February 1989, First Interstate prematurely sold assets in the capital reserve fund, resulting in a loss in excess of $621,000 when the bonds were refunded in December 1991. First Interstate and its shareholder moved for summary judgment on several grounds, including that the bank had not

mismanaged the trust funds, that HCH was well informed of the bank's actions through monthly reports, and that HCH's claims were barred by the
748 *748 applicable statutes of limitations. Without specifying the grounds, the trial court granted First Interstate's motion for summary judgment. HCH did not appeal.

On October 1, 1993, while the First Interstate lawsuit was still pending, HCH learned about Peat Marwick's 1985 agreement with First Interstate and that Peat Marwick's 1985 audit of First Interstate's records had revealed irregularities in First Interstate's accounting of the trust assets. According to HCH, Peat Marwick informed First Interstate but not HCH of the irregularities. HCH further claims it then discovered that Peat Marwick had advised First Interstate that the capital reserve fund could be set at an amount lower than what the trust indenture required. And HCH asserts that Peat Marwick did not report that advice to HCH.

HCH sued Peat Marwick in federal court on July 14, 1995, but the case was dismissed for lack of subject matter jurisdiction. HCH then filed suit in state court. For this appeal, Peat Marwick concedes that July 14, 1995, is the applicable date to determine whether HCH's claims were barred when filed.[3]

[3] *See* Tex. Civ. Prac. Rem. Code § 16.064(a).

In this case, HCH alleged that Peat Marwick, as the trust's auditor, either negligently or intentionally failed to disclose First Interstate's mismanagement of the trust. HCH further alleged causes of action for breach of warranty (which is not part of this appeal) and violations of the DTPA.

In support of its motion for summary judgment on limitations grounds, Peat Marwick attached HCH's original petition in the suit against First Interstate. That petition sought recovery for the same injury — the premature selling of the fund assets in 1989 resulting in a loss in excess of $621,000 — that HCH alleges in this suit was caused by Peat Marwick's wrongful conduct. Peat Marwick contends that the petition against First Interstate demonstrates that HCH knew of its claim no later than February 1, 1993. Apparently in response, HCH amended its petition to allege that not until October 1, 1993, did it learn of Peat Marwick's role in the disputed financial irregularities. But it does not appear that HCH filed a formal response to Peat Marwick's motion for summary judgment or produced any evidence to defeat the motion. As mentioned, the trial court granted summary judgment.

I. Summary Judgment Standard of Review

The standard for reviewing a summary judgment under Texas Rule of Civil Procedure 166a(c) is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law.[4] In conducting our review, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor.[5]

[4] *See, e.g., Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

[5] *See Nixon*, 690 S.W.2d at 548-49.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense.[6] Thus, the defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury.[7] If the movant establishes that the statute of limitations bars the

action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations.[8] *749

[6] *See Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997).

[7] *See Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990); *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 n. 2 (Tex. 1988).

[8] *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

II. Accrual of HCH's DTPA Claim

A DTPA claim is subject to a two-year statute of limitations. The claim accrues when "the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."[9] Thus, the discovery rule applies to HCH's DTPA claim.[10] We note that effective September 1, 1995, the Legislature amended the DTPA to exempt professional services with some exceptions. But because this suit was originally filed before that date, the 1995 amendments do not apply.[11]

[9] Tex. Bus. Com. Code § 17.565.

[10] *See Burns*, 786 S.W.2d at 267; *see also Murphy v. Campbell*, 964 S.W.2d 265, 271 (Tex. 1997).

[11] *See* Tex. Bus. Com. Code § 17.49(c).

Contending that during the relevant time period Peat Marwick had worked for First Interstate independently as well as for HCH, HCH argues that its claims against Peat Marwick did not accrue until October 1, 1993, when it learned through discovery in the First Interstate suit that Peat Marwick knew of financial irregularities in the bond issue but failed to report them to HCH. In agreeing with HCH, the court of appeals erroneously concluded that in recent decisions this Court employed a "new formulation" of the discovery rule.[12] The court of appeals held that under this "new formulation," a claim does not accrue until plaintiff knows not only of the injury, but the specific nature of each wrongful act that may have caused the injury.[13] This is incorrect. The rule in those cases was, as it is in this one, that accrual occurs when the plaintiff knew or should have known of the wrongfully caused injury.[14]

[12] *See* 948 S.W.2d at 946 (citing *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997); *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)).

[13] *See id.* at 947.

[14] *See Murphy*, 964 S.W.2d at 271; *Diaz*, 941 S.W.2d at 99; *S.V.*, 933 S.W.2d at 4; *see also Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998); *Russell v. Ingersoll Rand Co.*, 841 S.W.2d 343, 344 n. 3 (Tex. 1992); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990).

The summary judgment evidence established that the wrongful injury HCH alleges it suffered is the loss of over $621,000 in December 1991 when it refunded the bonds following the premature sale in 1989 of the reserve fund assets. Significantly, HCH sued First Interstate over this precise injury in early 1993, less than two years later. Indisputably, HCH was aware by then of its injury and that its injury was caused by the wrongful conduct of another.

The loss from the premature sale of the fund assets should have caused HCH to investigate not only the possibility that First Interstate had mismanaged the fund assets, as HCH apparently did because it sued First Interstate, but also Peat Marwick's possible involvement in the mismanagement and loss. HCH had hired Peat Marwick to do annual trust asset audits, including the reserve fund, to ensure compliance with the trust indenture. Therefore, the loss should have caused HCH to also investigate why its auditor, Peat Marwick, did not discover or report the mismanagement.

As an independent ground to defeat summary judgment, HCH asserts that Peat Marwick fraudulently concealed its wrongful conduct, and limitations did not begin to run until HCH knew or should have known of its injury. HCH also asserts that its pleading is sufficient summary judgment evidence of the affirmative defense of fraudulent concealment to defeat Peat Marwick's summary judgment motion. In both respects, HCH is incorrect.

First, a party asserting fraudulent concealment as an affirmative defense to the statute of limitations has the burden to raise it in response to the summary judgment motion[15] and to come forward with summary judgment evidence raising a fact issue on each element of the fraudulent concealment defense.[16] A mere pleading does not
750 satisfy *750 either burden.[17] Thus, even assuming that HCH pled fraudulent concealment as an affirmative defense to Peat Marwick's answer pleading limitations, HCH still had to respond to Peat Marwick's summary judgment motion. There is no such response in the record. Therefore, HCH did not carry its burden to both plead the defense and support it with summary judgment evidence.

15 *See* Tex. R. Civ. P. 166a(c); *Hudson v. Wakefield*, 711 S.W.2d 628, 630 n. 1 (Tex. 1986); *City of Houston*, 589 S.W.2d at 679.

16 *See American Petrofina, Inc. v. Allen* 887 S.W.2d 829, 830 (Tex. 1994); *Nichols v. Smith*, 507 S.W.2d 518, 521 (Tex. 1974).

17 *See City of Houston*, 589 S.W.2d at 678.

Second, when a defendant has fraudulently concealed the facts forming the basis of the plaintiff's claim, limitations does not begin to run until the claimant, using reasonable diligence, discovered or should have discovered the injury.[18] Because Peat Marwick's summary judgment evidence conclusively established that HCH discovered its injury more than two years before it sued Peat Marwick, Peat Marwick is entitled to summary judgment. As with the discovery rule, once HCH knew that it had been injured by fund mismanagement, it should have investigated why its auditor, Peat Marwick, had failed to discover or report the mismanagement to HCH. Accordingly, fraudulent concealment pleadings do not rescue HCH's DTPA claim.

18 *See Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1995); *Estate of Stonecipher v. Estate of Butts*, 591 S.W.2d 806, 809 (Tex. 1979).

III. Accrual of HCH's Negligence Claim

Under Section 16.003 of the Civil Practice and Remedies Code, negligence claims, including accounting malpractice, must be brought "not later than two years after the day the cause of action accrues."[19] Because the statute does not define or specify when accrual occurs, we look to the common law to determine when a cause of action accrues.[20]

19 Tex. Civ. Prac. Rem. Code § 16.003(a); *see also Murphy*, 964 S.W.2d at 270.

20 *See Childs*, 974 S.W.2d at 36; *Murphy*, 964 S.W.2d at 270.

HCH argues that its negligence claim against Peat Marwick did not accrue until it learned through discovery in the First Interstate suit of Peat Marwick's wrongful conduct. We disagree.

This Court has never considered whether the discovery rule applies to auditing malpractice claims. Assuming without deciding that it does, however, the summary judgment evidence establishes that HCH knew or should have known of its negligence claim more than two years before it filed suit. HCH relies on the same wrongfully caused injury asserted in the DTPA cause of action to claim that Peat Marwick was negligent. And as we have mentioned, the evidence conclusively establishes that HCH knew of the reserve fund's mismanagement, at least, no later than when it filed the first suit against First Interstate, February 1, 1993. Consequently, HCH's negligence claim is

also time-barred. Furthermore, as with HCH's DTPA claims, its fraudulent concealment pleadings do not rescue the negligence claim.

Peat Marwick has established the affirmative defense of limitations by conclusively showing that HCH's causes of action accrued more than two years before HCH filed suit. As a result, limitations bars HCH's claims for DTPA violations and negligence and Peat Marwick is entitled to summary judgment. Therefore, we reverse the court of appeals' judgment and render judgment that HCH take nothing.

No. 16-0323
SUPREME COURT OF TEXAS

Lance v. Robinson

543 S.W.3d 723 (Tex. 2018)
Decided Mar 23, 2018

No. 16–0323

03-23-2018

John A. LANCE, Debra L. Lance, F.D. Franks, and Helen Franks, Petitioners, v. Judith and Terry ROBINSON, Gary and Brenda Fest, Virginia Gray, Butch Townsend and Bexar–Medina–Atascosa Counties Water Control and Improvement District No. 1., Respondents

Amicus Curiae Timothy Patton. Dan V. Pozza, Pozza & Whyte, PLLC, San Antonio, TX, Cynthia Cox Payne, John D. Payne, Attorney's at Law, Bandera, TX, for Petitioners F.D. Franks, Helen Franks, Debra L. Lance, John A Lance. Edward T. Hecker, Gostomski & Hecker, P.C., San Antonio, TX, for Respondent Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1. Stephan B. Rogers, Kelly P. Rogers, Ross S. Elliott, Rogers & Moore, PLLC, Boerne, TX, for Respondents Brenda Fest, Gary Fest, Virginia Gray, Judith Robinson, Terry Robinson, Butch Townsend.

Justice Boyd delivered the opinion of the Court.

Amicus Curiae Timothy Patton.

Dan V. Pozza, Pozza & Whyte, PLLC, San Antonio, TX, Cynthia Cox Payne, John D. Payne, Attorney's at Law, Bandera, TX, for Petitioners F.D. Franks, Helen Franks, Debra L. Lance, John A Lance.

Edward T. Hecker, Gostomski & Hecker, P.C., San Antonio, TX, for Respondent Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1.

Stephan B. Rogers, Kelly P. Rogers, Ross S. Elliott, Rogers & Moore, PLLC, Boerne, TX, for Respondents Brenda Fest, Gary Fest, Virginia Gray, Judith Robinson, Terry Robinson, Butch Townsend.

Justice Boyd delivered the opinion of the Court.

> So stupendous is the conception, so vast the scale of actual accomplishment in the construction of the Medina Dam Project that thousands of its nearest neighbors have positively no conception of the immensity of this undertaking. Yet, by a strange twist of Fate's perversity, this everlasting monument to man's mastery over the greatest forces of nature has achieved a deserved fame in the four corners of the earth, until not only the kings of finance, but royalty itself has leaned forward from its gilded throne and hearkened to the resistless lure of this giant among enterprises.[1]
>
> [1] 1920s sightseeing brochure touting a "lovely scenic ride" to Medina Dam, http://www.edwardsaquifer.net/medina.html (last visited March 23, 2018).

One hundred years ago, the Medina Valley Irrigation Company (MVICO) embarked on an ambitious plan to create a functional oasis in the Texas Hill Country. The project, which included the Medina Dam, the Diversion Dam a few miles downstream, and a twenty-six-mile canal system, was an engineering marvel at the time. When

MVICO completed the Medina Dam in 1912, it became the largest dam in the state and the fourth largest in the country. By the time the lake first reached its capacity in 1919, the 254,000 acre-feet of water creating 100 miles of live-oaked shoreline had become a popular destination. In addition to the scenic views and recreational opportunities in the Box Canyon west of San Antonio, the project has provided agricultural
727 irrigation, prevented *727 flooding, supplied drinking water, and offered a peaceful place to live or enjoy a weekend home.[2]

[2] *See Medina Lake* , Texas State Historical Association , https://tshaonline.org/handbook/online/articles/rom09 (last visited March 23, 2018); Zeke MacCormack, *100 Years Later, Medina Dam Still a Marvel* , San Antonio Express & News , (Aug. 20, 2012), http://www.mysanantonio.com/news/local_news/article/100-years-later-dam-still-a-marvel-3799952.php; Rob McCorkle, *Medina Dam at 100* , Texas Highways (June 2012), http://www.texashighways.com/blog/item/4544speaking-of-texas-medina-dam-at-100.

But the project has faced its challenges as well. Seventy men died while constructing the dam. The investors and operators endured financial defaults and receiverships. Droughts and the canyon's porous limestone have repeatedly left docks stranded on a lake bed dry enough for cattle grazing. Floods and aging have required expensive re-stabilization efforts. And disputes over ownership and easement rights in the land surrounding the lake have resulted in repeated and protracted litigation.

In this case, three families who own lots on a peninsula at Medina Lake filed suit after their new neighbors denied them access to an open-space area the community has long considered public space for recreation and access to the lake. The new neighbors claim they own the open-space area and that the community members have no easements or other rights to use it. The plaintiffs contend that a local water district owns the land, and alternatively, that they have an easement right to use it regardless of who owns it. The trial court and court of appeals agreed with the plaintiffs. We affirm in part and reverse in part and remand the case to the trial court.

I.

Background

To develop the Medina Dam Project, MVICO had to acquire property rights from those whose lands would be flooded to create the lake. MVICO acquired those rights in various forms from numerous different landowners, including Theresa Spettle and her three daughters. In January 1917, the Spettles conveyed slightly over 1,500 acres to MVICO. The deed for this conveyance (the Spettle Deed) describes eighteen separate tracts by referring to each tract's acreage amounts, prior surveys, and metes and bounds. For example, the deed describes the tract that included the land at issue in this case as "104.5 acres, more or less, off the West end of Survey No. 231–Adams, Beaty, & Moulton, Medina[3] County, Texas, more particularly described by metes and bounds as follows: Commencing at point "0 1", thence ...," followed by numerous calls describing specific distances in particular directions, until finally "to place of beginning."

[3] The tract is actually located in Bandera County. The defendants' expert opined that the mistaken reference to Medina County renders the deed ambiguous. But the trial court refused to consider his report because it was filed after the deadline for summary-judgment evidence, in support of the Petitioners' motion for rehearing. Although the Petitioners cite to this evidence in their appellate briefing, they do not complain of the trial court's refusal to consider it. They have also never relied on that portion of the expert's report for any argument made in this Court or the courts below.

The Spettle Deed provides that the lands conveyed to MVICO were to "be used forever as a reservoir for storing water above" the Medina Dam, "for use in the maintenance and operation of the Irrigation System." It expressly gives MVICO the right to "submerge" the property conveyed "by backing water from its dam over *728 said lands." It also reserves for the Spettles rights to "use" the waters and to construct improvements "upon the edges of the reservoir," specifically:

> (1) The right to use the waters in the reservoir for domestic purposes;
>
> (2) The right to use the waters in the reservoir for bathing, boating, fishing and hunting; and,
>
> (3) The right to construct upon the edges of the reservoir at their own peril and expense and without any liability of the grantors [sic] for the destruction thereof by water or otherwise, such improvements as may be necessary and incident to the exercise of the privileges above reserved by the grantors, their heirs and assigns, which privileges are to be exercised by said parties only to the extent and in proportion which the acreage above described bears to the total acreage under the flow line of said reservoir.

About six months after executing the Spettle Deed, Theresa and her daughters executed another deed through which they partitioned among themselves about 4,000 acres of their remaining land in Bandera and Medina counties, which until then they held jointly in common. In this Partition Deed, each of the Spettles agreed, on behalf of themselves "and their heirs and assigns," that Theresa would own certain tracts totaling 928 acres, her daughter Mathilda Spettle Redus would own tracts totaling 728 acres, and Mathilda's two sisters would jointly own the remaining acres. The Partition Deed describes each of the tracts by referring to acreage amounts, previous surveys, and boundaries based on points, directions, distances, and various natural markers. The Deed partitions the respective lands to each of the Spettles "TO HAVE AND TO HOLD ... with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise incident or appertaining ... as her separate estate, her heirs and assigns ... in fee simple and forever."

As mentioned, the Spettle Deed grants MVICO the right to "submerge" the land it acquired from the Spettles "by *backing water* from its dam over said lands," and it permits the Spettles to exercise their reserved rights and privileges "only to the extent and in proportion which the acreage above described bears to the total acreage under the *flow line* of said reservoir." Apparently alluding to those references, the Partition Deed refers to "the backwater or flow line" as one of the natural markers used to describe the partitioned tracts' boundaries. For example, the deed describes the lands partitioned to Mathilda as including "197 acres of Survey No. 231 in name of Adams, Beaty & Moulton," described "more particularly" by metes and bounds beginning at a "stake set on [MVICO]'s backwater or flow line," returning a few times to points along the "backwater or flow line," continuing at one point "along with the meanders of said backwater or flow line, as surveyed for [MVICO]," and finally returning to "the place of beginning."

The land at issue in this case is on a narrow peninsula at Medina Lake known as Redus Point, which was originally part of the 728 acres partitioned to Mathilda Spettle Redus. Respondents Judith and Terry Robinson, Gary and Brenda Fest, and Virginia Gray (collectively, the Robinsons) own Lots 1, 2, and 3, respectively, in the Redus Point Addition Subdivision. The peninsula generally runs from north to south, and the lots sit along the western edge, atop an incline or "cliff" as high as fifty feet above the water when the lake is full. Although it is possible to access the water below the cliff from these lots, the steep, rocky incline makes it difficult and, *729

at least to some degree, unsafe. Because of this, the Robinsons and other Redus Point lot owners have regularly accessed the water along the peninsula's gently sloping eastern side, usually using an open space east of Fauries Road, which runs from north to south along the peninsula. Since at least the 1970s, the Robinsons and other lot owners have constructed improvements in this open space, including walkways, a dock, a boat ramp, and a deck. Although the open space has long been surrounded by a low post-and-cable fence, the community members have freely used the open space as a place for recreation and easy access to the water.

The Robinsons claim that their joint rights to use and improve the open space derives from the Spettle Deed, in which the Spettles reserved to themselves and "their heirs and assigns" the right to "use the waters in the reservoir" for domestic and recreational purposes and to "construct upon the edges the reservoir ... such improvements as may be necessary and incident to the exercise of [those] privileges." They contend that Theresa Spettle and her three daughters, including Mathilda, each retained these rights in the Partition Deed as "hereditaments and appurtenances ... belonging, or in anywise incident or appertaining" to their partitioned lands. More specifically, the Robinsons contend that the Spettle Deed granted MVICO fee-simple ownership in all of the land up to a point that is even with the height of the top of Medina Dam, which the parties refer to as Elevation 1084. The Robinsons assert that the Spettle Deed's reference to MVICO's right to use the land for "backing water" to a "flow line" refers to Elevation 1084, which—they say—constitutes the boundary between the land MVICO acquired and the land the Spettles retained.

When the lake is full, however—as opposed to either low or flooded—the water reaches only up to a point that is even with the top of a spillway that is adjacent to and twelve feet below the top of the dam. The parties refer to this point as Elevation 1072. Because of the spillway, the lake reaches only to a meandering line at Elevation 1072, leaving a dry area around the lake between Elevation 1072 and Elevation 1084. Because the difference consists of altitudinal feet, the twelve-foot span covers only a short distance on the cliffs on the west side of the peninsula but extends a much longer distance on the gently sloping eastern side. The Robinsons argue that this dry area between Elevation 1084 and Elevation 1072—often referred to as the "contour zone"—was acquired by MVICO in the Spettle Deed and now belongs to MVICO's successor-in-interest, the Bandera–Medina–Atascosa Counties Water Improvement District No. 1 (the Water District). According to the Robinsons, "the backwater or flow line" in the Partition Deed refers to Elevation 1084, and the contour zone between that line and Elevation 1072 constitutes the "edges of the reservoir" and the "acreage under the flow line" upon which the Spettles reserved the right to construct improvements necessary to exercise their right to use the water for domestic and recreational purposes. The open space where the Robinsons and other Redus Point residents have gathered and constructed improvements lies within this contour zone. The residents appear to have shared the view that they, as Mathilda Spettle Redus's "assigns," jointly hold the right to enjoy and construct improvements within the contour zone, at least around the Redus Point peninsula.

In October 2011, however, John and Debra Lance purchased Lot 8 on Redus Point, which sits across Fauries Road from the open-space area. Within a few months, the Lances began replacing the old
730 post-and-cable *730 fence with a new three-rail fence and posting "No Trespassing" signs. In April 2012, the Lances sent a letter to Judith Robinson, notifying her that they intended to construct a fence "on our property" and asking her to remove the wood deck from "our property." When the Robinsons challenged the Lances' claim to the

open space, the Lances produced two deeds they received from Lot 8's prior owners, F.D. and Helen Franks.

The first deed—a Warranty Deed—describes the "Property" conveyed as "Lot 8, of Redus Point Addition," as identified in the plat filed for the Redus Point subdivision. The deed conveys title to Lot 8, "together with all and singular the rights and appurtenances thereto in any wise belonging," and expressly excepts any "portion of the Property lying or being situated below the 1084' Contour Line of Medina Lake, Bandera County, Texas." But it then conveys "any portion of the Property lying or being situated below the 1084' Contour Line ... without express or implied warranty" or any common-law or statutory warranties.

In the second deed—entitled Deed Without Warranty—the Franks conveyed title to the open-space area, defined as "a 0.282 acre tract of land, more or less, out of the Adams, Beaty and Moulton Survey No. 231, Abstract No. 18, in Bandera County, Texas." Exhibit A to this Deed Without Warranty further describes the property conveyed as "being on Medina Lake adjacent to Lot No. 8," with boundaries running from the "northeast corner of Lot No. 8," across Fauries Road to an iron rod in " 'the 1072 Contour," then "along said '1072 Contour,' " then back across Fauries Road to "the most southerly corner of said Lot No. 8," and then "along the southeast line of said Lot No. 8" to the beginning point. In other words, the Deed Without Warranty purports to convey the area in the contour zone between Elevation 1084 and Elevation 1072 that lies east of Lot 8, which includes the disputed open space.

In contrast to the Robinsons' theory, the Lances contend that the Spettle Deed granted MVICO fee-simple ownership only up to Elevation 1072, and not up to Elevation 1084. In their view, the Spettle Deed's and Partition Deed's references to the "backwater or flow line" refer to the top of the spillway, not the top of the dam, because the lake stores water only up to the spillway. Thus, the Spettle Deed conveyed the land up to Elevation 1072 to MVICO, not up to Elevation 1084, and the Partition Deed partitioned the land down to that same point, so the Spettles retained ownership of the land in the contour zone. And, according to the Lances, the Deed Without Warranty confirms that they purchased the portion of that land that constitutes the disputed area from the Franks.

The Robinsons filed this suit against the Lances and the Franks (collectively, the Lances) in June 2012, asserting claims for declaratory judgment, nuisance, and use of a fraudulent deed under Chapter 12 of the Civil Practices and Remedies Code. They later amended their petition to add claims to quiet title, for intentional infliction of emotional distress, intentional invasion of privacy, and civil conspiracy. They sought temporary and permanent injunctive relief, declaratory relief, actual damages, statutory damages, exemplary damages, court costs, and attorney's fees. The trial court granted a temporary restraining order and later a temporary injunction, finding that the Lances failed to establish that the Franks had any interest in the property the Deed Without Warranty describes.[4] *731 The Robinsons moved for partial summary judgment on their claim for declaratory judgment and on some elements of their claim for violations of Chapter 12. *See* TEX. CIV. PRAC. & REM. CODE § 12.003(a)(8). While that motion was pending, the Water District filed a petition in intervention asserting that it "owns the land below Elevation 1084 which encompasses the entire tract of land purportedly transferred from the Franks to the Lances" in the Deed Without Warranty. The Water District asserted claims for declaratory judgment, Chapter 12 violations, and civil conspiracy.

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[4] The Lances did not take an interlocutory appeal from the temporary-injunction order, but later filed a motion to dissolve the injunction on the ground that the Robinsons lacked standing to challenge the Lance's ownership of the disputed area and thus the trial court lacked jurisdiction. The

trial court denied that motion, and the Lances did take an interlocutory appeal from that order. The appellate court affirmed, finding that the Robinsons have standing as "interested persons" in light of their claim to an easement across the disputed area and to ownership of the dock and other improvements. *Lance v. Robinson* , No. 04-12-00754-CV, 2013 WL 820590, at *1 (Tex. App.–San Antonio, Mar. 6, 2013, no pet.).

The trial court granted the Robinsons' motion for partial summary judgment and entered an order declaring that:

- the Deed Without Warranty did not convey any ownership interest in the disputed area to the Lances because the Franks had no such interest to convey,

- the Water District owns the disputed area, as successor to MVICO as grantee under the Spettle Deed,

- the Robinsons and the Lances have easements to use and construct improvements in the disputed area, as assignees of the rights the Spettles reserved in the Spettle Deed and Mathilda retained in the Partition Deed,

- the Deed Without Warranty is an "invalid cloud and burden" on the Robinsons' easement rights,

- the Deed Without Warranty is a "deed or other record" under Chapter 12,

- the Lances and Franks used the Deed Without Warranty with an intent to "create the appearance of an actual conveyance of ownership in the disputed area," pursuant to Chapter 12, and

- the Robinsons own an "express easement" in the disputed area and have standing under Chapter 12.[5]

[5] The trial court denied the Robinsons' request for an additional declaration that the Lances and Franks used the Deed Without Warranty with intent to cause the Robinsons to "suffer financial injury" under Chapter 12.

Following an extended hearing on the Lances' motion for rehearing, the trial court amended its order by striking through the declaration that the Water District owns the disputed area. As a result, on the issue of ownership, the final summary-judgment order declares that the Lances do not

own the disputed area, but it does not declare who does own it. The Robinsons then moved to sever the court's order into a new cause, and both the Robinsons and the Water District moved for their attorney's fees. The trial court granted the motions, severed the order into a new cause, and entered a final judgment awarding attorney's fees to the Robinsons and the Water District. The Lances appealed, the court of appeals affirmed, and we granted the Lances' petition for review.

II.

Summary–Judgment Evidence

The Lances first contend that the trial court erred in granting the Robinsons' *732 summary-judgment motion because the Robinsons failed to attach any of the relevant deeds to that motion. At the earlier temporary-injunction hearing, the Robinsons offered certified copies of the deeds into evidence, and the trial court admitted them without objection. In their summary-judgment motion, the Robinson's expressly "referenced and specified" the injunction-hearing transcript and exhibits "as evidence in support of" the motion. At the summary-judgment hearing, the trial court judge had the temporary-injunction transcript—including the deeds and other exhibits—in front of him, reviewed the deeds, and discussed them with counsel, including the Lances' counsel, who never raised this issue or otherwise objected on the ground that the Robinsons had not re-filed the deeds as attachments to their summary-judgment motion. Nevertheless, the Lances now contend that the Robinsons failed to meet their summary-judgment burden because the deeds were not in evidence.

The court of appeals held that any defect in the summary-judgment evidence was not substantive, and thus the Lances waived this issue by failing to object in the trial court. 542 S.W.3d 606, 2016 WL 147236, at *4–5 (Tex. App.–San Antonio 2016). Relying primarily on *MBank Brenham, N.A. v. Barrera* , 721 S.W.2d 840 (Tex. 1986) (per curiam), the Lances argue that a movant's failure to attach summary-judgment evidence to a summary-judgment motion creates a complete absence of evidence and thus constitutes substantive error that requires reversal even without an objection because all summary-judgment evidence must be "part of the summary judgment record." We disagree. It is true that the complete absence of evidence necessary to support a summary judgment constitutes a substantive error that may be raised for the first time on appeal. *Id.* 842 (holding that "no evidence existed" to create a fact issue because respondent "never filed [the evidence] with the court as summary judgment proof").[6] But in *MBank* and similar cases, the necessary evidence was completely absent from the trial court's file, and not just from the "summary judgment record."

> 6 *See also Sorrells v. Giberson* , 780 S.W.2d 936, 937 (Tex. App.–Austin 1989, writ denied) (holding that appellant's failure to object to appellee's failure to attach promissory note to summary-judgment affidavit was "irrelevant to the issue of the sufficiency of [appellee's] proof to support summary judgment" because the note "was completely absent from the summary judgment record" and thus could not "serve as a basis for summary judgment"); *Trimble v. Gulf Paint & Battery, Inc.* , 728 S.W.2d 887, 888 (Tex. App.–Houston [1st Dist. 1987, no writ) (holding that failure to attach exhibits to summary-judgment evidence was a substantive defect because a summary-judgment motion "must be supported by its own summary judgment proof" and, "in order to constitute part of the summary judgment evidence, must be attached to the affidavit").

The Lances acknowledge that the trial court admitted the deeds as evidence at the temporary-injunction hearing, but contend that the Robinsons had to re-file them as attachments to their summary-judgment motion. Whether this alleged error involved the "form of the summary-judgment record" or its "substance" is irrelevant

because the alleged error was not error at all. Our rules require a trial court to grant a summary-judgment motion if the evidence "*on file at the time of the hearing* , or filed thereafter and before judgment with permission of the court," establishes that the movant is "entitled to judgment as a matter of law." TEX. R. CIV. P. 733 166a(c) (emphasis added).[7] Here, *733 the deeds were indisputably "on file" with the court at the time of the summary-judgment hearing. At the very end of the temporary-injunction hearing, after the Robinsons' attorney asked if he should "withdraw" the exhibits, the trial court announced, "I'm going to leave all the exhibits with the file." The court's docket sheet reflects that the court reporter filed the deeds with the court clerk that same day, just as the rules require. *See* TEX. R. CIV. P. 75a (requiring court reporter to "file with the clerk of the court all exhibits which were admitted into evidence ... during the course of any hearing, proceeding, or trial"). The record thus establishes beyond doubt that the deeds were "on file at the time of the hearing," as rule 166a requires.

7 The parties may rely on discovery products "not on file with the clerk" if they timely file copies "or a notice containing specific references to the discovery ... together with a statement of intent to use the specified discovery as summary judgment proofs." Tex. R. Civ. P. 166a(d).

Nevertheless, the Lances contend that the deeds cannot be considered "filed" because they do not appear in the clerk's record of the summary-judgment hearing. Similarly, they argue the Robinsons could not rely on the deeds for summary-judgment purposes because they did not request an exhibits volume from the temporary-injunction hearing until after the case was on appeal. Therefore, they argue, "the record containing the deeds did not exist at the time of the summary judgment hearing." "At a minimum," they assert, "summary judgment evidence must be part of the summary judgment record in such a way that when the parties bring that record to an appellate court, that evidence will be found in that appellate record."

These arguments conflate the trial court's "file" with the clerk's and reporter's "records." *Compare* TEX. R. CIV. P. 75b (requiring all "filed exhibits" to "remain at all times in the clerk's office or in the court or in the custody of the clerk") *with* TEX. R. APP. P. 34.5, 34.6 (designating what "filings" should be included in the appellate record). The fact that evidence is not included in a clerk's record or reporter's record does not mean it was not "on file" with the trial court. While the trial court's "file" always exists, the court clerk and court reporter do not prepare the "record" until requested. *See* TEX. R. APP. P. 34.6(b)(1), 35.1, 35.3. An item may be on file with the court yet "omitted" from the record and thus "supplemented" to the record. TEX. R. APP. P. 34.5(c).

Here, while the deeds may not have been included in the "summary judgment record," the appellate record confirms that they were on file with the court at the time of the summary-judgment hearing because they had been offered and admitted at the prior temporary-injunction hearing. They thus qualified as proper summary-judgment evidence, and the trial court did not err by relying on them. *See, e.g.* , *Stark v. Morgan* , 602 S.W.2d 298, 304 (Tex. Civ. App.–Dallas 1980, writ ref'd n.r.e.) (holding exhibit "offered" at prior temporary-injunction hearing was "on file with the court" and thus properly "before the trial court for the purposes of the hearing on the motion for 734 summary judgment").[8] *734 **III.**

8 *See also, e.g.* , *Galindo v. Snoddy* , 415 S.W.3d 905, 914 (Tex. App.–Texarkana 2013, no pet.) (holding trial court was required "to consider the explicitly referenced summary judgment evidence that was on file" with the court); *Kastner v. Jenkens & Gilchrist, P.C.* , 231 S.W.3d 571, 581 (Tex. App.–Dallas 2007, no pet.) (noting that the rules "do not require that

summary judgment evidence be physically attached to the motion"); *Johnson v. Driver* , 198 S.W.3d 359, 363 (Tex. App.–Tyler 2006, no pet.) (holding exhibits not attached to summary-judgment motion but attached to opposing party's response "were properly before the court at the time it ruled"); *Gerald C. Marshall & Co. v. Gilley* , No. 11-93-248-CV, 1994 WL 16189969, at *3 (Tex. App.–Eastland Nov. 17, 1994, no writ) (not designated for publication) (holding evidence submitted with two earlier summary-judgment motions were "on file" when judgment was entered and constituted "adequate summary judgment evidence"); *R.I.O. Sys., Inc. v. Union Carbide Corp.* , 780 S.W.2d 489, 492 (Tex. App.–Corpus Christi 1989, writ denied) (holding evidence "on file prior to the summary judgment hearing," including documents attached to earlier summary-judgment motion, were "proper summary judgment evidence"); *Vaughn v. Burroughs Corp.* , 705 S.W.2d 246, 248 (Tex. App.–Houston [14th Dist.] 1986, no writ) (holding evidence attached to earlier summary-judgment motion was "properly before the court"); *Dousson v. Disch* , 629 S.W.2d 111, 112 (Tex. App.–Dallas 1981, writ dism'd w.o.j.) (holding documents filed four months before summary-judgment motion were proper summary judgment evidence).

Summary–Judgment Burden

The Lances next argue that the trial court erred by granting summary judgment because the Robinsons did not meet their summary-judgment burdens to support the trial court's declarations. Specifically, they challenge the trial court's declarations that (A) the Lances do not own the disputed area, (B) the Robinsons have an express easement over the disputed area, and (C) the Robinsons established certain elements of their Chapter 12 claim. In addition, they contend that (D) the trial court erred by awarding attorney's fees to the Robinsons and to the Water District.

A. Ownership interests

The trial court granted summary judgment declaring that the Deed Without Warranty did not convey any ownership interest in the disputed area to the Lances because the Franks had no such interest to convey, and that the Deed Without Warranty is therefore an "invalid cloud and burden" on the Robinson's easement rights. Initially, the court also declared that the Water District owns the disputed area, but it deleted that declaration in its amended summary-judgment order. The court's judgment thus declares that the Lances do not own the disputed area, but it does not declare who does own it.

The Lances challenge these declarations, arguing that the Robinsons did not bring the proper cause of action to challenge the Deed Without Warranty, that the Robinsons lacked standing to challenge the validity of the Deed Without Warranty, that the Robinsons were required to establish who *does* own the disputed area to prove that the Lances do *not* own it, and that the Robinsons failed to prove either of those facts. The Lances also complain that the appeals court failed to adequately address some of these arguments in violation of Texas Rule of Appellate Procedure 47.1. Although the court of appeals did inadequately address some of the Lances' arguments, none of the arguments merit reversal of the trial court's ownership declarations.

1. Legal theories

The Robinsons pleaded and sought summary judgment on their claims regarding the parties' rights to the disputed area under the Declaratory Judgments Act. The trial court's declarations included declarations that the Lances do not have any ownership interest in the disputed area because the Franks had no interest in that land to convey in the Deed Without Warranty. The Lances argue that the Declaratory Judgments Act is the wrong vehicle to determine title to the disputed area. Instead, they argue that the Robinsons had to plead and prove claims for trespass to try title. The

Lances further argue that none of the Robinsons' claims supported the declaration that the Lances have created an "invalid cloud" on the alleged easement. We hold that the Declaratory Judgments
735 *735 Act was the proper mechanism by which the Robinsons could seek declarations regarding the Lances' authority to obstruct the Robinsons' access to the disputed area.

a. Trespass to try title

The Lances argue that the trial court's "rulings concerning ownership, both for and against," cannot be determined in a suit for declaratory judgment, but instead "must be presented and determined under Trespass to Try Title principles." In response, the Robinsons assert that they were not required to file a trespass-to-try-title action because they do not claim any ownership or possessory rights to the disputed area, and instead are seeking only to protect their alleged easement.[9] We agree with the Robinsons.

[9] The Robinsons also respond by arguing that (1) the Lances waived this complaint by failing to adequately address it in their brief on the merits in this Court; (2) a declaratory-judgment action is an appropriate vehicle for an "equitable plea" to set aside a deed that is "fake" or fraudulent, even if the effect of the declaration is to determine title; and (3) the Deed Without Warranty is effectively a mere quitclaim deed that "raises no presumption of ownership, and therefore does not put title into issue." While we agree that the Lance's briefing on this point is less than robust, they do clearly assert that "rulings concerning ownership, both for and against, must be presented and determined under Trespass to Try Title principles," and that "finding ownership, or a lack thereof, in a party with a valid deed, is a determination involving ownership and that determination cannot be made under the Declaratory Judgments Act." While they failed to directly support these statements with citations to authority in their opening brief, they did cite and address several relevant authorities when discussing the Robinsons' responses to these points. Without deciding the Robinsons' waiver argument, we will liberally construe the Lances' brief and proceed to address this issue. Because we agree that the Robinsons were not required to file a trespass-to-try-title action because they do not claim any ownership or possessory right to the disputed area, we need not address their alternative arguments.

The issue of whether a claimant must seek relief related to property interests through a trespass-to-try-title action, as opposed to a suit under the Declaratory Judgments Act, has been the source of some confusion in this Court and others. The Declaratory Judgments Act provides that a "person interested under a deed ... or whose rights, status, or other legal relations are affected by a ... contract ... may have determined any question of construction or validity arising under the instrument ... and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE § 37.004(a). This action "provides an efficient vehicle for parties to seek a declaration of rights under certain instruments." *Martin v. Amerman* , 133 S.W.3d 262, 265 (Tex. 2004).

But the Texas Property Code states that a "trespass to try title action is *the* method of determining title to lands, tenements, or other real property." TEX. PROP. CODE § 22.001(a) (emphasis added). Actions under this statute "involve detailed pleading and proof requirements." *Martin* , 133 S.W.3d at 265 (citing TEX. R. CIV. P. 783–809). "To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned." *Id.* (citing *Plumb v. Stuessy* , 617 S.W.2d 667, 668 (Tex. 1981)). Through the years,

the issue of whether claimants were required to seek relief through a trespass-to-try-title action has been relevant to such questions as whether this Court had jurisdiction on appeal, whether
736 particular proof was required to *736 prevail, whether res judicata applied when the claimant was involved in multiple suits, and whether the parties could recover their attorney's fees. *See id.* at 264–67 (describing history of such disputes).[10]

[10] The issue of which theory applies when the parties dispute a boundary line between their adjacent properties presented particular difficulties for the courts. The parties to such a dispute necessarily compete for title to the disputed strip between the asserted boundaries, but they typically do not contest their opponent's ownership subject to the proper boundary. *See Martin* , 133 S.W.3d at 267. We thus held that, although such boundary disputes must be brought as trespass to try title actions, the requirements are "relaxed" when "there would have been no case but for the question of boundary," so that "a recorded deed is sufficient to show an interest in the disputed property without having to prove a formal chain of superior title." *Id.* at 265, 268 (citing *Plumb,* 617 S.W.2d at 669). The Legislature has since amended the Declaratory Judgments Act to expressly provide that, notwithstanding the trespass-to-try-title statute, a claimant may sue for declaratory relief "when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties." Tex. Civ. Prac. & Rem. Code § 37.004(c).

The trespass-to-try-title statute, however, only applies when the claimant is seeking to establish or obtain *the claimant's* ownership or possessory right in the land at issue. While section 22.001(a) may be unclear on this point, *see* TEX. PROP. CODE § 22.001(a) ("A trespass to try title action is the method of determining title."), subsequent sections provide greater clarity. *See id.* §§ 22.002 (requiring the claimant to demonstrate "evidence of ... sufficient title to maintain a trespass to try title action"), .003 (describing the judgment in a trespass-to-try title action as establishing "title or right to possession ... against the party from whom the property is recovered"). Our procedural rules thus require the petition in a trespass-to-try-title action to expressly state that "the plaintiff was in possession of the premises or entitled to such possession." TEX. R. CIV. P. 783(d).

We have explained that the "plaintiff in a trespass to try title action must allege and prove the right to present possession of the land." *City of Mission v. Popplewell* , 156 Tex. 269, 294 S.W.2d 712, 714 (1956). For example, we have held that claimants who sought to establish a future remainder interest in land that was subject to a life estate could not obtain such relief though a trespass-to-try-title action because the claimants "had no right of possession to the property at that time." *Dougherty v. Humphrey* , 424 S.W.2d 617, 621 (Tex. 1968). The trespass-to-try-title statute "is typically used to clear problems in chains of title or to recover possession of land unlawfully withheld from a rightful owner," and the plaintiff in such an action must "establish superior title" to the property. *Martin* , 133 S.W.3d at 265. A trespass-to-try-title plaintiff, in other words, "must recover upon the strength of his own title." *Rogers v. Ricane Enters., Inc.* , 884 S.W.2d 763, 768 (Tex. 1994) ; *see Coinmach Corp. v. Aspenwood Apartment Corp.* , 417 S.W.3d 909, 926 (Tex. 2013) (noting that a determination of the claimant's "legal interests and possessory rights ... is the very relief that the trespass-to-try-title statute governs").

For this reason, we have explained that the trespass-to-try-title statute does not apply to a claimant who seeks to establish an easement, because such a claimant "does not have such a possessory right." *Popplewell* , 294 S.W.2d at 714. An easement "is a nonpossessory interest that authorizes its holder to use the property for only particular purposes." *Marcus Cable Assocs., L.P. v. Krohn* , 90 S.W.3d 697, 700 (Tex. 2002) (citing RESTATEMENT (THIRD) OF PROPERTY

(SERVITUDES) § 1.2 cmt. d). A claimant who
737 prevails on a claim *737 to establish an easement cannot prevail on a trespass-to-try-title claim without also establishing title or a possessory right. *Dougherty* , 424 S.W.2d at 621.

We hold that the Robinsons were not required to file a trespass-to-try-title action to assert their alleged easement rights over the disputed area in Redus Point. In seeking to establish alleged easement rights, the Robinsons do not assert any ownership or possessory interest in the disputed area. Although they do allege that the Water District owns the disputed area and they challenge the Lances' ownership claim, it was not necessary to resolve the ownership issue to determine the Robinson's easement rights. The Robinsons claim to have an easement over the disputed area regardless of whether the Water District or the Lances own the land, and a trespass-to-try-title action is not required when "ownership of the fee is not determinative of the existence of the easement" *Popplewell* , 294 S.W.2d at 714.

Nevertheless, the Robinsons challenged the Lances' denial of access to the disputed area on two different grounds. First, they argued that the Lances cannot deny them access because the Lances do not own the disputed area. Second, they argued that even if the Lances own the area, the Robinsons have an easement over the disputed area. The trial court's declarations regarding ownership (*i.e.* , that the Deed Without Warranty did not convey any ownership interest in the disputed area to the Lances because the Franks had no such interest to convey) relate to the first argument, not to the second. But the Robinsons sought these declarations to defend their alleged nonpossessory easement, not to assert superior title or possessory rights in themselves. We hold that they could properly pursue that relief under the Declaratory Judgments Act, and were not required to sue for trespass to try title.

The Water District, however, intervened and alleged that it is the "title owner of the disputed tract and the surrounding area below Elevation 1084." Like the Robinsons, the Water District sued under the Declaratory Judgments Act, seeking declarations that it owns the disputed area and that the Lances do not. Because the Water District asserted superior title and possessory rights in itself, it could only bring that claim as a suit for trespass to try title. The trial court initially declared that the Water District owns the land, but it later amended its order to strike that declaration. Although the trial court declared that the Lances do not own the land, the effect of that declaration could only deprive the Lances of the right to exclude the Robinsons; it could not resolve any ownership dispute between the Lances and the Water District. Because the Lances and the Water District assert competing claims for superior title to the disputed area, those claims must be resolved through a suit for trespass to try title. The summary-judgment order before us today, however, does not resolve that dispute.

b. Suit to quiet title

The Lances argue that the trial court erred by declaring that the Deed Without Warranty is an "invalid cloud and burden" on the Robinson's easement rights. First, they contend that the Robinsons "did not plead a cause of action in equity to remove a cloud on an easement. And importantly, they did not move for summary judgment on this ground." Alternatively, they argue that a party cannot sue to quiet title by removing a cloud on title unless the party owns the title allegedly clouded. Because the Robinsons do not claim ownership in the disputed area, the
738 Lances argue the *738 Robinsons were not entitled to any declaration quieting title in the disputed area or removing any cloud on their alleged easement.

Based on the record before us, we agree that the Robinsons' pleadings do not support the trial court's declaration. In their original petition, the Robinsons did not plead any claim to quiet title.

They did plead such a claim in their fifth amended petition, requesting legal and equitable relief to "cancel, quiet and remove the cloud created by the [Deed Without Warranty] from their easement rights, dominant estate and/or other rights in the disputed tract." But the Robinsons filed their fifth amended petition three months after they filed their motion for partial summary judgment. The record does not include any prior amended petitions, so we are unable to determine whether they pleaded a quiet-title claim before they moved for summary judgment.

In their summary-judgment motion, the Robinsons moved for a declaration that the Deed Without Warranty "is an invalid cloud on the ownership rights of the plaintiffs and [the Water District] in the disputed area." As the Lances note, however, the Robinsons do not assert any "ownership rights" in the disputed area, and the judgment declared that the Deed Without Warranty creates an "invalid cloud" on the Robinsons' easement rights, not on any ownership rights. We agree with the Lances that the Robinsons' pleadings do not support the trial court's declaration. We can find no evidence or indication, however, that the Lances ever objected to the invalid-cloud declaration on that ground.

The court of appeals held that the Lances waived any complaint about the invalid-cloud declaration by failing to adequately brief the issue. 542 S.W.3d at 617. We agree with the Lances that the court of appeals erred in this conclusion. The Lances asserted in their brief to the court of appeals that a "deed cannot be a cloud on an easement" and a "cloud on title" only exists when a claim or encumbrance affects or impairs "the title to the owner of the property," citing *Hahn v. Love* , 321 S.W.3d 517, 531 (Tex. App.–Houston [1st Dist.] 2009, pet. denied). Because the Robinsons "are not claiming to be the owners of the disputed area," and "[b]ecause it is irrelevant who owns the land, there is no such thing as a deed causing an invalid cloud on an easement." We hold this argument, though brief, was sufficient to preserve the substantive argument on appeal.

We have never addressed the nuanced differences between quiet-title claims, trespass-to-try-title claims, and modern declaratory-judgment claims in any real depth. And although we have noted in passing that a claim "for declaratory judgment ... to remove cloud from title to their 'easements' " appeared sufficient, *see James v. Drye* , 159 Tex. 321, 320 S.W.2d 319, 323 (1959), we have never directly addressed the question of whether a quiet-title claim is an appropriate vehicle to remove a cloud on an easement. The Texas courts of appeals have addressed quiet-title actions more extensively, explaining that such an action, "also known as a suit to remove cloud from title—relies on the invalidity of the defendant's claim to the property." *Essex Crane Rental Corp. v. Carter* , 371 S.W.3d 366, 388 (Tex. App.–Houston [1st Dist.] 2012, pet. denied) (citing *Longoria v. Lasater* , 292 S.W.3d 156, 165 n.7 (Tex. App.–San Antonio 2009, pet. denied)).

More specifically, the appellate courts have stated that a "suit to 'quiet title' and a 'trespass-to-try-title claim' are both actions to recover possession of land unlawfully withheld, though a quiet-title suit is an equitable remedy whereas a trespass-to-try-title suit is a legal remedy afforded *739 by statute." *Cameron Cty. v. Tompkins* , 422 S.W.3d 789, 797 (Tex. App.–Corpus Christi 2013, pet. denied). The quiet-title suit exists "to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of better right." *Bell v. Ott* , 606 S.W.2d 942, 952 (Tex. Civ. App.–Waco 1980, writ ref'd n.r.e.) (quoting *Thomson v. Locke* , 66 Tex. 383, 1 S.W. 112, 115 (1886)). The plaintiff in a quiet-title suit "must prove, as a matter of law, that he has a right of ownership and that the adverse claim is a cloud on the title that equity will remove." *Essex Crane* , 371 S.W.3d at 388 (citing *Hahn,* 321 S.W.3d at 531).

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These decisions appear to support the Lances' argument that an equitable quiet-title action is available only to those who claim ownership in the property whose title is allegedly "clouded." The Robinsons, however, cite to other appellate-court decisions that appear to support their argument that such actions provide an appropriate method to remove a cloud on an alleged easement. *See, e.g.* , *Anderson v. McRae* , 495 S.W.2d 351, 356–57 (Tex. App.–Texarkana 1973, no writ) (holding subdivision lot owners were entitled to seek to quiet title through Declaratory Judgments Act for recreational easements in areas adjacent to lake); *Howard v. Young* , 210 S.W.2d 241, 243 (Tex. Civ. App. 1948, writ ref'd n.r.e.) (holding quiet title and injunctive relief were appropriate remedies when an easement's dimensions and validity were at issue). We find it unnecessary to decide that issue here, however, because the parties have identified no reason why the answer would make any difference in this case. If the trial court properly declared that the Deed Without Warranty conveyed no ownership interest to the Lances or that the Robinsons enjoy an easement over the disputed area regardless of who owns it, the declaration that the Lances created an "invalid cloud and burden" on the easement is irrelevant. And if the trial court erred by both its ownership and easement declarations, its invalid-cloud declaration cannot stand. We thus decline to issue any advisory opinions in this case regarding the nature and requirements of a quiet-title action.

2. Standing

The Lances argue that the trial court's ownership declarations constitute error because the Robinsons lack standing to challenge the Deed Without Warranty. Relying primarily on our decision in *Nobles v. Marcus* , 533 S.W.2d 923 (Tex. 1976), they argue that a claimant who is not a party to a deed cannot sue to set it aside. And until a court sets a deed aside, it remains "valid and represents prima facie evidence of title." *Id.* at 926 ; *see also Morlock, L.L.C. v. Bank of N.Y.* , 448 S.W.3d 514, 517 (Tex. App.–Houston [1st Dist.] 2014, pet. denied) ("A third party lacks standing to challenge this voidable defect in the assignment."); *Lopez v. Morales* , No. 04-09-00476-CV, 2010 WL 3332318, at *3 (Tex. App.–San Antonio, Aug. 25, 2010, no writ) (mem. op.) ("[A] suit to set aside a deed obtained by fraud can only be maintained by the defrauded party.").

We do not agree that the *Nobles* rule applies here. The *Nobles* plaintiffs sought to enforce a judgment lien against property the judgment debtor, Macoa, had deeded to others. *Nobles* , 533 S.W.2d at 925. But instead of pleading and proving "there had been a fraudulent conveyance that was a fraud upon" themselves, the plaintiffs alleged that the deed was invalid because Macoa's corporate officer committed forgery and a fraud *against Macoa* by signing the deed without authority. *Id.* at 925–26. They pleaded these acts "as frauds upon the corporation and not as fraud upon their own rights as creditors." *Id.* at 926. After holding
740 that the facts did not *740 support a forgery claim, we held that the plaintiffs lacked standing to pursue the void-for-fraud claim because deeds "procured by fraud are voidable only, not void, at the election of the grantor." *Id.*

We did not hold in *Nobles* that grantors are the only parties who can ever sue to set aside a deed for fraud. In fact, we noted that the law is "well settled in Texas" that creditors who plead a fraudulent-conveyance claim—meaning a claim for fraud against *themselves* as creditors—may "maintain an action 'to vacate a fraudulent conveyance of his debtor's land.' " *Id.* at 925 (quoting *Eckert v. Wendel* , 120 Tex. 618, 40 S.W.2d 796, 797 (1931)). But because "only the person whose primary legal right has been breached may seek redress for an injury," a creditor cannot seek to set aside a conveyance based on fraud against *the grantor* . *Id.* at 927. "A suit to set aside a deed obtained by fraud can only be maintained by the defrauded party." *Id.* "The plaintiffs lack standing to bring the present action, not because they incompletely pleaded the

elements of a fraudulent conveyance but because they pleaded fraud, and under those pleadings they were not the defrauded party." *Id.*

In this case, however, the Robinsons do not seek to set aside the Deed Without Warranty based on fraud by the grantees (the Lances) against the grantors (the Franks). Rather, their claim is that the Lances and the Franks both committed fraud against third parties (the Robinsons) by creating and presenting a deed that purports to convey an interest that neither of them owns. The Robinsons have standing to challenge the deed's effect on their alleged easement because they are the ones who are allegedly suffering harm. If the deed is fraudulent or otherwise invalid, the Franks as grantors are not harmed; the Robinsons are. Whether the Robinsons can challenge the deed as fraudulent or merely as ineffective to convey any interest does not matter; in either case, the Robinsons, who allege an easement interest in the land, may seek a declaratory judgment that the deed conveyed no ownership interest. We conclude that the Robinsons have standing to seek a declaration that the deed is ineffective because they allege the deed harms their own interests, not those of the parties to the deed.

3. Evidentiary support

Having concluded that the Robinsons had standing to sue for ownership declarations and that their pleadings support that relief, we now turn to the Lances' arguments that the evidence does not support the declarations. The court of appeals did not address these evidentiary arguments. Instead, after holding that the deeds were properly in evidence and that the Robinsons were not required to sue for trespass to try title, the court concluded that none of the Lances' remaining arguments could be "construed to challenge the trial court's" declarations regarding ownership. 542 S.W.3d 606. The Lances complain that the court of appeals violated Rule 47.1 by failing to address "every issue raised and necessary to final disposition of the appeal." *See* TEX. R. APP. P. 47.1 ; *see also Sloan v. Law Office of Oscar C. Gonzalez, Inc.* , 479 S.W.3d 833, 834 (Tex. 2016) ("This Court has held that 'this provision is mandatory, and the courts of appeals are not at liberty to disregard it.' ") (quoting *West v. Robinson* , 180 S.W.3d 575, 577 (Tex. 2005) (per curiam)). Any issue that is not properly presented on appeal, however, is not considered raised for purposes of Rule 47.1. Further, Rule 47.1 requires only that the court of appeals address issues necessary to dispose of the appeal. TEX. R. APP. P. 47.1.

We agree with the Lances that they challenged the ownership evidence on *741 appeal. In their merits brief,[11] the Lances argued that the evidence did not conclusively establish that they had no ownership in the disputed area because (1) the Robinsons' expert agreed that "there are a number of homes that have been built below elevation 1084 along Medina Lake's (former) shoreline," and that testimony "conflicts with the [Robinsons'] testimony that they believe they have access to lake property at any location if the property is below elevation 1084"; and (2) F.D. Franks (the grantor in the Deed Without Warranty) "testified that it was his intent to convey whatever rights, if any, he had to that area to the Lances." The Lances argued that this evidence created a fact issue, so "ownership of the disputed area remains disputed and as long as that dispute remains, there can be no determination of title." In short, they asserted, "Nothing was conclusively proven at the hearing on the issues of ownership to the disputed area or the easement rights of the Plaintiffs to the disputed area." We agree that the court of appeals should have addressed these evidentiary arguments, however meritless they may be.

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[11] The brief's "Issues Presented" included whether the Robinsons met "their burden of conclusively establishing each element of their causes of action," and whether the trial court had a "factual basis to render a summary judgment for the Plaintiffs declaring that the Deed Without Warranty did not convey ownership or that the

> Franks had no ownership interest to convey to the Lances or that the Lances do not own the disputed area." In the "Summary of the Argument" section, the Lances asserted that, beyond the alleged procedural errors, the Robinsons "failed to prove the issue of ownership as a matter of law" because the evidence "does not establish title to the disputed area."

But they are meritless, and we agree with the trial court that, at least on this record, no evidence could support a finding that Lances own the disputed area. The Lances rely on the Deed Without Warranty to establish their ownership, but no evidence establishes that the Franks had any interest in the land that deed describes. The only deed by which the Franks obtained any interest in land on Redus Point is the deed the Franks received from their predecessors, the Prados. That deed, however, describes the property conveyed as being "Lot 8" in the Redus Point Addition subdivision, as recorded in the Bandera County plat records. The evidence establishes that a prior owner, Dee Walker, platted the Redus Point Addition in 1950. Walker acquired the land in 1947, as part of a 200–acre conveyance by deed from Mathilda Spettle Redus. The deed from Mathilda to Walker described 200 acres in Bandera County (including 125 acres out of Survey No. 231) using metes and bounds beginning at a point on the "No. 1084 contour line," returning to another point on the "No. 1084 contour line," then "Northerly with the ... No. 1084 contour line, to the point of beginning."

The Redus–to–Walker deed appears to establish that, whatever the 1917 Spettle Deed's and the 1917 Partition Deed's references to the "backwater and flow line" may have referred to (*i.e.* , to the height of the dam at Elevation 1084 or to the height of the spillway at Elevation 1072), the land Walker acquired from Mathilda in 1947 extended only to Elevation 1084. The uncontroverted evidence also establishes that, when Walker platted the Redus Point Addition subdivision in 1950, he platted the lots to the Elevation 1084 boundary, consistent with the land he had acquired from Mathilda.[12] Except for the Deed Without
742 *742 Warranty, all of the subsequent deeds involving property on Redus Point, including the Prados' deed to the Franks and the Franks' Warranty Deed to the Lances, identify the land conveyed by referring not to metes and bounds, but to specific "Lots" in the Redus Point Addition, as identified in the plat of record. So regardless of whether Mathilda or MVICO owned the contour zone area between Elevation 1084 and Elevation 1072 after the Spettle Deed and Partition Deed, this record can only establish that the property Walker received from Mathilda and then platted and conveyed extends only to Elevation 1084. And since Walker is the sole source of any interest the Lances or Franks claim, no evidence exists in this record that the Franks had any interest to convey to the Lances in land below Elevation 1084.

> 12 The 1950 plat was admitted into evidence at the temporary-injunction hearing and a copy is in the Court's record, but its print is not sufficiently legible to confirm that the lots were platted to Elevation 1084. The Robinsons' expert witness, however, a professional land surveyor, testified that he had reviewed the plat and all of the deeds and that Redus Point is "platted to Elevation 1084." The Robinsons also offered an exhibit that summarized a "chronology" of the relevant deeds, which refers to the 1950 plat as including "27 lots, platted to Elevation 1084 meander lines." This exhibit was admitted into evidence without objection. Although the Lances contend that some evidence would support the conclusion that the Spettle Deed and Partition Deed involved land that reached down to Elevation 1072, we have found no record evidence that the land deeded to Walker or the Redus Point lots, as platted or as subsequently conveyed, extend past Elevation 1084.

Like the trial court, however, we do not hold that the Water District owns the disputed area described in the Deed Without Warranty, in the contour zone surrounding Redus Point, or in any of the contour zone surrounding Medina Lake. That is one of many issues that have given rise to other litigation involving Medina Lake,[13] but we cannot and need not resolve it here. MVICO acquired different rights in the lands for Medina Lake from numerous different landowners through different deeds that each contain their own unique provisions.

13 *See, e.g.* , *Whalen v. Firmin* , No. 04-99-00056-CV, 1999 WL 1246928, at *1 (Tex. App.–San Antonio Dec. 22, 1999, no pet.) (not designated for publication) (addressing similar dispute arising from deed without warranty conveying lot in contour zone in different Medina Lake subdivision); *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n* , 2 S.W.3d 459, 462 (Tex. App.–San Antonio 1999, pet. denied) (affirming summary judgment for landowners finding Water District violated Open Meetings Act); *Haby v. Howard* , 757 S.W.2d 34, 36–40 (Tex. App.–San Antonio 1988, writ denied) (holding fact issues precluded summary judgment in dispute between private owners over whether deed's references to "high datum water line" and "fronting and adjoining Medina Lake" referred to the "1084 foot natural contour line" or the "1072 foot natural contour line"); *Medina Lake Prot. Ass'n v. Bexar–Medina–Atascosa Ctys. Water Control & Imp. Dist. No. 1* , 656 S.W.2d 91, 96 (Tex. App.–San Antonio 1983, writ ref'd n.r.e.) (holding that landowners established that Water District impliedly dedicated road across the spillway and dam as a public road); *Bexar–Medina–Atascosa Ctys. Water Control & Imp. Dist. No. 1 v. Medina Lake Prot. Ass'n* , 640 S.W.2d 778, 780 (Tex. App.–San Antonio 1982, writ ref'd n.r.e.) (holding Water District lacked authority to enforce regulations governing recreational activities "below the 1084 foot elevation" against plaintiffs who "resided outside of District's regulatory area"); *Bexar–Medina–Atascosa Ctys. Water Imp. Dist. No. 1 v. Wallace* , 619 S.W.2d 551, 552–56 (Tex. Civ. App.–San Antonio 1981, writ ref'd n.r.e.) ; *see also* Stephan Rogers, *Judge Approves WPOA–BMA Settlement* , The Bandera Bulletin (April 26, 2005) (describing court-approved settlement of litigation between Water District and owners of waterfront property on Medina Lake), http://www.banderabulletin.com/news/article_dd33b8f4-f468-5b46-ab0f-11d36ac413c2.html.

Even as to the disputed area at issue here, we cannot say that the record in this case conclusively establishes that the Water District or any other party owns it. In support of their assertion that the Water District owns it, the Robinsons and the
743 Water District rely on the Spettle Deed, *743 the Partition Deed, and the testimony of their expert witness. But the Spettle Deed and Partition Deed never mention Elevation 1084 or Elevation 1072; they merely refer to "storing water," "backing water," the "flow line," and "the backwater or flow line." The Robinsons' expert made no attempt to define the land MVICO acquired through the Spettle Deed or the land the Spettles partitioned in the Partition Deed based on the metes-and-bounds descriptions in the deeds. Instead, he testified merely to his opinion that Elevation 1084 is the "boundary line between [the Water District property] and all the adjoining land" because that is the elevation at which the reservoir "stores water." But he made no effort to address the Lances' argument that the reservoir "stores water" only up to the level of the spillway (Elevation 1072), not up to the top of the dam, and he admitted that many Medina Lake residents own land and have homes below Elevation 1084. We find that his effort to define the boundaries based on the deeds' references to "backwater or flow lines," without attempting to follow the actual metes-and-bounds descriptions, is insufficient to

establish the boundaries as a matter of law. Thus, even if the Water District had properly pleaded their claim as a trespass-to-try-title suit, we agree with the trial court's decision not to declare that the Water District owns the disputed area or any land in the contour zone, at least based on this summary-judgment record.

The Lances argue, however, that by failing to prove who owns the disputed area, the Robinsons necessarily failed to prove that the Lances do not own it. We disagree. As we have explained, the Lances claim their title from the Franks, who claim theirs from the Prados, who in turn must trace theirs to Walker, who this record establishes only owned and platted Redus Point down to Elevation 1084. That evidence sufficiently establishes that the Lances do not own the disputed area, regardless of who does own it. We conclude that the trial court did not err in granting summary judgment on this record declaring that the Deed Without Warranty did not convey any ownership interest in the disputed area to the Lances because the Franks had no such interest to convey. And as the trial court properly concluded, if the Lances do not own the disputed area, they have no authority to deny the Robinsons or others access to it.

B. Easement interests

Having addressed the trial court's declarations regarding ownership of the disputed area, we now turn to its declarations regarding the Robinsons' claim to an easement. The court of appeals noted that, because the Lances' lack of any interest in the disputed area deprives them of any right to exclude the Robinsons from it, "it would appear the remaining arguments presented are moot." 542 S.W.3d at 620. But the court went on to address the remaining claims because they "pertain to the origin and continuing validity of the Robinson parties' asserted easement to the use and enjoyment of the subject land." *Id.*

We agree that, for purposes of resolving the Robinsons' declaratory-judgment claim, our holding that the Lances do not own the disputed area makes it unnecessary to decide whether the Robinsons have a valid easement. Because the Lances do not own the disputed area, they have no authority to deny the Robinsons access and no standing to contest the alleged easement. Absent some dispute regarding their possible joint rights as alleged easement holders, there can be no justiciable controversy between them. Any dispute over the existence, scope, or validity of the alleged easement must occur between the Robinsons and whoever owns the disputed area.*744 The validity of the Robinsons' alleged easement could remain relevant, however, to the issue of whether they have standing to pursue their claim for statutory violations under Chapter 12. As explained below, however, we conclude that the Lances have waived any challenges to that issue, at least for purposes of this appeal.

744

C. Chapter 12

In addition to their claims for declaratory relief, the Robinsons sought summary judgment on certain elements of their claim under Chapter 12 of the Civil Practice and Remedies Code. Chapter 12 prohibits a person from making, presenting, or using a "document or other record" with:

(1) *knowledge* that the document or other record is a *fraudulent* court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;

(2) *intent* that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a *valid* lien or claim against real or personal property or an interest in real or personal property; and

(3) *intent* to cause another person to suffer:

(A) physical injury;

(B) financial injury; or

(C) mental anguish or emotional distress.

TEX. CIV. PRAC. & REM. CODE § 12.002(a) (emphases added). A person who violates this prohibition is liable to each injured person for (1) actual damages or $10,000, whichever is greater, (2) court costs, (3) reasonable attorney's fees, and (4) exemplary damages "in an amount determined by the court." *Id.* § 12.002(b). When the violation involves a "fraudulent lien or claim against real or personal property or an interest in real or personal property," any "person who owns an interest in the real or personal property" may sue for such relief. *Id.* § 12.003(8).

The Robinsons alleged that the Franks and Lances violated Chapter 12 by executing, presenting, filing, and relying on the Deed Without Warranty. The trial court granted summary judgment on this claim in part, declaring that the Deed Without Warranty is a "deed [sic] or other record" and that the Lances "made, used, and/or presented the Deed Without Warranty with the intent to create the appearance of an actual conveyance of ownership in the disputed area." These declarations indicate that the Robinsons have established the statute's second requirement. The court also declared that the Robinsons "own an express easement in the disputed area, and have standing under [Chapter 12]." The Robinsons did not seek a summary-judgment declaration, however, that the Lances and Franks knew that the Deed Without Warranty was "fraudulent," and the trial court declined to declare that the Lances used the deed with the intent to cause the Robinsons to "suffer financial injury," so the Robinsons have not obtained summary judgment on the statute's first and third requirements.

The Lances' challenges to the trial court's Chapter 12 declarations are confusing at best. They begin by asserting that "there is ... no support for [the] declarations the judgment makes as to [the] elements of this claim." They then suggest that, in "the interest of judicial economy, this Court should make that determination now so that the Defendants, on remand, will not be met with having to defend a Chapter 12 claim." Finally, citing to no legal authorities at all, they offer a
745 brief *745 challenge to two of the trial court's Chapter 12 declarations. First, they assert that the Robinsons lack standing under Chapter 12 because (a) they "do not own an express easement in the disputed area," and (b) even if they did own an easement, their "easement rights cannot be impaired by any owner or by any deed. Ownership does not matter." Second, they argue that "the very nature of a deed without warranty negates the trial court's finding" that the Lances intended to "create the appearance of an actual conveyance of ownership in the disputed area," apparently because a deed without warranty makes "no promise or guarantee of ownership."

The Lances block-copied these arguments from the merits brief they filed in the court of appeals. Like us, the court of appeals found them to be "disjointed statements that propose no clear or concise argument." 542 S.W.3d 606. As that court noted, the Lances' assertion that we should

determine now that "there is ... no support" for the declarations "in the interest of justice," so that the Lances will not have to defend the Chapter 12 claim on remand, appears to argue that *the Lances* are entitled to summary judgment on this claim. And as the court of appeals concluded, "even if this court were to make the determination proposed, given that this is an appeal from summary judgment, this court cannot make such a determination, nor would any determination preclude any litigation on remand." 542 S.W.3d 606. For this reason, the court summarily overruled this issue and declined to address the Lances' specific arguments.

In their responsive brief in this Court, the Robinsons note that their Chapter 12 claims remain pending in the trial court *in the original case* from which this case was severed. Because of this, they assert, without any further explanation, that "the merits" of the trial court's Chapter 12 declarations "are not before this Court." Based on that assertion, the Lances may raise any jurisdictional challenges to the Robinsons' Chapter 12 claims, including any challenge to the Robinsons' standing to pursue such claims, in the pending original case.

We conclude that the court of appeals did not err in declining to address the Lances' arguments on the Chapter 12 claims, and we decline to address them for the same reason. Procedurally, we—like the court of appeals—cannot issue any decision on those claims that would protect the Lances from having to defend them in the original case. And substantively, we simply do not comprehend the Lances' arguments. Their assertion that the Robinsons lack standing (regardless of whether they have an easement) because easement rights "cannot be impaired by any owner or by any deed" seems to contradict their reliance on the Deed Without Warranty as the basis for denying the Robinsons access to the disputed area. And their argument that a Deed Without Warranty cannot be intended to be an "actual conveyance of property" contradicts their claim that, unlike a "quitclaim" deed, the Deed Without Warranty gave them ownership of the disputed area. In the absence of any citations to legal authorities that support or clarify these contentions, we decline to consider them.[14]

[14] We do note our disagreement, however, with the Robinsons' argument that the court of appeals has already determined their standing under Chapter 12 in the Lances' interlocutory appeal from the trial court's denial of the motion to dissolve the temporary injunction, and that the Lances are bound to that determination. *See Lance* , 2013 WL 820590, at *5. The court of appeals did not hold that the Robinsons had standing under Chapter 12; it held only that for the purposes of deciding whether the trial court abused its discretion in refusing to dissolve the temporary injunction based on the Lances' claim that the Robinsons lacked standing, "both [the Robinsons'] pleadings and their arguments to the trial court at the hearing on the motion to dissolve support [the Robinsons'] claim of standing as easement holders and personal property owners under section 12.003(a)(8)." *Id.* Because the issue of whether the Robinsons proved standing as a matter of law presents a substantially different question than the one presented regarding the temporary injunction, the law-of-the-case doctrine does not support the Robinsons' argument on this point. *See Hudson v. Wakefield* , 711 S.W.2d 628, 630 (Tex. 1986) ("Further, the doctrine does not necessarily apply when either the issues or the facts presented at successive appeals are not substantially the same as those involved on the first trial.").

D. Attorney's fees

Finally, the Lances argue that the trial court erred
746 by awarding attorney's fees to *746 the Robinsons and to the Water District under the Declaratory

Judgments Act. Specifically, they assert that both awards lack evidentiary support and neither is "equitable and just."

The Robinsons respond by asserting that the Lances waived review of their attorney's fees by failing to raise it as an issue it their petition for review in this Court. The Lances did not note attorney's fees as a separate issue in their petition for review, but they did address attorney's fees under their general issue that the court of appeals "failed to address numerous issues raised and necessary to final disposition of the appeal in violation of Texas Rule of Appellate Procedure 47.1." *See Tex. Dep't of Transp. v. City of Sunset Valley* , 146 S.W.3d 637, 642 n.1 (Tex. 2004) ; *Sterner v. Marathon Oil Co.* , 767 S.W.2d 686, 690 (Tex. 1989) ("[I]t is our practice to construe liberally points of error in order to obtain a just, fair, and equitable adjudication of the rights of the litigants."). However, their assertions as to that issue were limited solely to the attorney's fees awarded to the Water District and did not address the award of attorney's fees to the Robinsons. We agree with the Robinson that the Lances waived any challenge to the Robinsons' fee award by failing to adequately raise the issue in their petition for review. *Guitar Holding Co. v. Hudspeth Cty. Underground Water Conservation Dist. No. 1* , 263 S.W.3d 910, 918 (Tex. 2008) ("[I]ssues not presented in the petition for review and brief on the merits are waived.").

Regarding the fees awarded to the Water District, the Lances argue that the award is arbitrary and unreasonable because the Water District voluntarily intervened in this suit to assert its claim to ownership of the disputed area, the Water District did not move for summary judgment on that or any other claim, and the trial court refused to declare that the Water District owns the disputed area. They also contend that the court of appeals violated Rule 47.1 by failing to address these arguments. We agree that the court of appeals should have addressed the Water District's fee award. But in light of our holding that the Water District had to bring any claim to ownership of the disputed area as a trespass-to-try-title action, and that such ownership is irrelevant to the resolution of this suit in light of the court's determination that the Lances do not own the disputed area, we conclude that the trial court must reconsider this fee award. We reverse the award of fees to the Water District and remand the case to the trial court for reconsideration of that award. TEX. CIV. PRAC. & REM. CODE § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.").

IV.

Conclusion

We affirm that part of the court of appeals' 747 judgment upholding the trial court's *747 declarations that the Lances do not own the disputed area described in the Deed Without Warranty. In light of that holding, we do not decide whether the Deed Without Warranty creates a cloud on the Robinsons' alleged easement over the disputed area, nor do we address the validity of that alleged easement. Because the Lances do not own the disputed area, they have no standing to challenge the Robinsons' alleged easement over that area or authority to exclude the Robinsons from the area. We hold that the Lances waived any challenge to the Chapter 12 declarations and any challenge to the attorney's fees awarded to the Robinsons. We reverse that part of the court of appeals' judgment upholding the award of attorney's fees to the Water District, however, and remand this case to the trial court for further proceedings consistent with this opinion.

Justice Blacklock did not participate in the decision.

No. 99-1037
Supreme Court of Texas

M.D. Anderson Hospital v. Willrich

28 S.W.3d 22 (Tex. 2000)
Decided Aug 24, 2000

No. 99-1037.

OPINION DELIVERED: August 24, 2000.

On Petition for Review from the Court of Appeals for the Thirteenth District of Texas.

Heather Leigh Horton, Richard Charles Geisler, John Cornyn, Atty. Gen., Andy Taylor, Linda Eads, Toni Hunter, Christine Guerra Edwards, Austin, for petitioner.

Gordon Cooper, II, Cooper Cooper, Houston, for responsdent.

PER CURIAM

The issue we consider here is whether a terminated employee, alleging discrimination, can rely on the employer's summary judgment evidence to contend on appeal that a fact issue exists that the employer's reason for terminating the employee was pretextual. We conclude that the employee can do so, but that here the employee failed to raise a fact issue. Accordingly, we reverse the court of appeals' judgment and render
23 judgment that the employee take nothing. *23

Harold Willrich was a utilities station operator for the University of Texas M.D. Anderson Cancer Center (UTMDA) from June 1981 until August 1995. Willrich, an African-American, alleges that he was subjected to racial slurs and jokes from co-workers and supervisors. In 1982, Willrich was selected, against his wishes, to replace a retiring maintenance worker for the night-shift. Among employees eligible for the night-shift job, Willrich had the highest job classification and was the only African-American. Willrich considered UTMDA's work environment to be hostile, and over the years he filed several complaints with management about racial incidents.

In June 1995, UTMDA announced a reorganization and reduction-in-force (RIF) for Willrich's Facilities Management Division. UTMDA eliminated existing positions and created a new organization with new positions. UTMDA asked all employees to express their preferences for three positions. Willrich requested only night-shift jobs (which were the least available) and promotions or lateral transfers. UTMDA did not select Willrich for a job in the new organization and terminated him in August 1995, along with thirty-four other employees of various races.

Willrich sued UTMDA under the Texas Commission on Human Rights Act (TCHRA) and alleged that his termination was racially discriminatory. UTMDA moved for summary judgment, asserting that Willrich was not terminated because of his race, but was terminated because: (1) the reorganization eliminated his former position; (2) he was not the most qualified candidate for the jobs he specified on his preference form; and (3) he only requested night-shift positions. Willrich did not file a response to UTMDA's summary judgment motion. He filed a motion to extend time to file a summary judgment response, which the trial court denied. After the trial court granted UTMDA's summary judgment motion, Willrich filed a motion for new trial alleging that his response to UTMDA's motion for summary judgment would have presented

disputed, genuine fact issues. In his court of appeals' brief, Willrich argued that the trial court erred by not granting him an extension of time to respond to UTMDA's motion for summary judgment. He also argued that the trial court erred in ruling that UTMDA showed as a matter of law that Willrich was terminated for a legitimate, nondiscriminatory reason. The court of appeals reviewed the attachments to UTMDA's summary judgment motion and concluded that material fact issues existed about UTMDA's reason for terminating Willrich. Accordingly, the court of appeals reversed the trial court's summary judgment and remanded for further proceedings.

Under Texas summary judgment law, the party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166 a(c); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex. 1999); *Wornick Co. v. Casis*, 856 S.W.2d 732, 733 (Tex. 1993). The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense. *See Rh ne-Poulenc, Inc*., 997 S.W.2d at 222-23; *Oram v. General Am. Oil Co*., 513 S.W.2d 533, 534 (Tex. 1974). Summary judgments must stand on their own merits. Accordingly, the nonmovant need not respond to the motion to contend on appeal that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment. *See Rhône-Poulenc, Inc.*, 997 S.W.2d at 223; *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678 (Tex. 1979). When reviewing a motion for summary judgment, the court takes the nonmovant's evidence as true, indulges every reasonable inference in favor of the nonmovant, and resolves all doubts in favor of the nonmovant. *See Nixon v.*
24 *Mr. Property* *24 *Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

In enacting the TCHRA, the Legislature intended to correlate state law with federal law in employment discrimination cases. Tex. Lab. Code § 21.001; *see NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999). Adhering to legislative intent, Texas courts have looked to federal law in interpreting the TCHRA's provisions. *See NME Hosps., Inc.*, 994 S.W.2d at 144; *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996); *Farrington v. Sysco Food Servs., Inc*., 865 S.W.2d 247, 251 (Tex.App.-Houston [1st Dist.] 1993, writ denied); *Stinnett v. Williamson County Sheriff's Dep't*, 858 S.W.2d 573, 576 (Tex.App.-Austin 1993, writ denied).

In discrimination cases, the United States Supreme Court has established a burden-shifting analysis. *See Reeves v. Sanderson Plumbing Prods., Inc.*, ___ U.S. ___, ___, 120 S.Ct. 2097, 2106 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) *; Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). Because this is a summary judgment motion, the burden remained on UTMDA under Rule 166a(c) to prove as a matter of law a legitimate, nondiscriminatory reason for Willrich's termination. *See Rhône-Poulenc, Inc.*, 997 S.W.2d at 223.

In its motion for summary judgment, UTMDA stated that it instituted the RIF to increase efficiency and to save money. UTMDA's summary judgment evidence showed that a six-member panel devised a reorganization plan eliminating all current positions and creating a new organization. The new organization was staffed according to the existing employees' performance, experience, education, evaluation, and preference forms. The employees received a memo outlining the RIF procedure and explaining that it was possible that an employee would be selected for a position other than his preferences or that the employee may not be selected for any position. UTMDA terminated Willrich as a part of the RIF because his former position was eliminated and he was not the most qualified candidate for the positions that he listed on his preference form. UTMDA's evidence

established as a matter of law that there was a legitimate nondiscriminatory reason for Willrich's termination.

Once UTMDA established a legitimate nondiscriminatory reason for Willrich's termination, Willrich had the burden to show that a fact issue existed that UTMDA's reasons for including him in the RIF were a pretext for discrimination. *See Reeves*, ___ U.S. at ___, 120 S.Ct. at 2106 *; Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996). Under Texas summary judgment law, Willrich could respond to UTMDA's summary judgment motion by presenting evidence raising a fact issue on pretext or by challenging UTMDA's summary judgment evidence as failing to prove, as a matter of law, that the RIF was a legitimate, nondiscriminatory reason for his termination. *See Rhône-Poulenc, Inc.*, 997 S.W.2d at 223. Here, Willrich argues that UTMDA's evidence failed to prove that the RIF was a legitimate, nondiscriminatory reason for his termination. Willrich points to his deposition, which is a part of UTMDA's summary judgment evidence, and asserts that his testimony demonstrates that he was fired because of his race and not because of a legitimate RIF. Willrich testified about four instances of racial slurs during his fourteen years of employment at UTMDA. The first two instances were from co-workers who used a racially derogatory term in a joke. Willrich testified in his deposition that he never complained about these two jokes told by his co-workers. These two instances occurred in 1981 and 1983. Willrich also testified that in 1988 his supervisor told a joke using the same derogatory
25 term and also referred to some *25 construction work using a similar term. Willrich reported the last instance in 1990, five years before the RIF, and his supervisor wrote an apology to Willrich.

Stray remarks, remote in time from Willrich's termination, and not made by anyone directly connected with the RIF decisions, are not enough to raise a fact question about whether UTMDA's reason for terminating Willrich was pretextual. *See Nichols,* 81 F.3d at 41-42; *Waggoner v. City of Garland*, 987 F.2d 1160, 1166 (5th Cir. 1993) ("[A] mere `stray remark' is insufficient to establish [race] discrimination"); *see also Gold v. Exxon Corp*., 960 S.W.2d 378, 384-85 (Tex.App.-Houston [14th Dist.] 1998, no pet.).

The court of appeals held that a fact issue existed about whether UTMDA used its job preference forms legitimately, and thus raised a fact issue about whether race was the reason UTMDA terminated Willrich. The court concluded that there was some evidence that Willrich was penalized for choosing night-shift positions on his form, whereas UTMDA considered employees who did not submit a preference form for any position. We disagree with the court of appeals that UTMDA's use of the preference forms raises a fact question on pretext. UTMDA's use of its preference forms was not inconsistent with how it told employees it would use them and was not based on race. UTMDA informed employees that their preferences would be considered, but that an employee could be reassigned to a position other than an employee's preference, or could be terminated. UTMDA reviewed Willrich's preference form and notified Willrich that it was eliminating his current night-shift position under the RIF and that he was not qualified for the other positions he listed. Additionally, Willrich does not raise a fact issue that the RIF was a pretext for racial discrimination. UTMDA's summary judgment evidence included Willrich's admission that he did not know who decided to terminate him or how the decision was made.

Subjective beliefs are insufficient to overcome UTMDA's summary judgment evidence. *See Nichols*, 81 F.3d at 42; *Gold*, 960 S.W.2d at 384. Specifically, Willrich's subjective belief that he was terminated based on race because of four racial jokes told in the workplace during his fourteen years of employment is insufficient to create a fact issue about whether UTMDA's legitimate nondiscriminatory reason for terminating Willrich was pretextual. Accordingly,

without hearing oral argument, we reverse the court of appeals' judgment and render judgment for UTMDA. *See* Tex. R. App. P. 59.1.

No. 02-0731
Supreme Court of Texas

Martin v. Amerman

133 S.W.3d 262 (Tex. 2004)
Decided Feb 13, 2004

No. 02-0731.

Argued October 1, 2003.

Opinion Delivered: February 13, 2004.

On Petitions for Review from the Court of
263 Appeals for the Sixth District of Texas. *263

Cathy J. Sheehan, Plunkett Gibson, Inc., San Antonio, for Amicus Curiae.

Walter D. Snider, Snider Morgan, L.L.P., Beaumont, for Petitioner.

Richard N. Evans, J. Mitchell Smith, Germer Gertz, L.L.P., Beaumont, for Respondent.

Justice O'NEILL delivered the opinion of the Court.

In this case we must decide whether a trespass-to-try-title action is the exclusive means to resolve a dispute between neighbors over the proper location of a boundary line separating their properties, or whether a declaratory judgment action is also an appropriate way. We hold that the Texas trespass-to-try-title statute governs the parties' substantive rights in this boundary dispute and that they may not proceed under the Texas Declaratory Judgments Act to recover attorney's fees. Accordingly, we affirm the court of appeals' judgment. 83 S.W.3d 858.

I

This dispute involves locating the proper
264 boundary line between two residential *264 properties in Beaumont, Texas. In 1987, Kirk and Suzanne Martin purchased a home located on a 2.005-acre tract of land Some six years later, the Martins erected a chain-link fence along what they believed to be their property's eastern boundary next to a wooded area. In 1997, William and Carolyn Amerman purchased their home on a 1.255-acre tract located to the east and around the corner from the Martins. The disputed boundary line forms the eastern edge of the Martin tract and the western edge of the Amerman tract. In 1998, the Amermans tore down the Martins' fence, believing that it illegally encroached on their property.

Although unable to agree on the boundary's location, the parties do agree that their respective chains of title do not conflict. All of the Martin acreage derives from the Crowell/Nelson grant and all of the Amerman acreage derives from the DeVoss/Pye grant. The dispute in this case arises from two conflicting surveys. The Martins' surveyor, Mark Whiteley, surveyed the Martin property in 1993 and set the northeast corner at a one-and-one-half-inch pipe identified in previous surveys as the proper corner location. Gilbert Johnston, the Amermans' surveyor, conducted his survey of the Amerman tract three years later and placed its northwest corner at a five-eighth-inch rod. The surveyors' differing placement of these corners causes the thirty-foot overlap at issue in this case.

The Martins filed suit seeking a judgment declaring the proper boundary line and granting permanent injunctive relief. They also alleged trespass and wrongful encroachment, adverse possession, trespass to try title, boundary by

recognition and acquiescence, and an action to quiet title, but ultimately nonsuited all claims except those for declaratory judgment and to remove the cloud on their title caused by the recorded Johnston survey. The Amermans filed a counterclaim for trespass to try title and also sought injunctive relief. Because the parties agreed that ownership of the disputed thirty-foot strip of land depended upon determining the boundary's proper location on the ground, the case was submitted to the jury solely as a boundary dispute. After hearing testimony about survey methods and the priority placed on different monuments, the jury found that the Martins' surveyor properly placed the boundary and that the Amermans' recorded survey placed a cloud on the Martins' title. The trial court rendered judgment on the jury's verdict and awarded the Martins attorney's fees pursuant to the Texas Declaratory Judgments Act. *See* TEX. CIV. PRAC. REM. CODE § 37.009.

The court of appeals affirmed the trial court's judgment in part, but held that, because the boundary dispute involved title to a strip of land, it was in the nature of a trespass-to-try-title action and must be treated as such. 83 S.W.3d at 864. Because the trespass-to-try-title statute does not provide for the recovery of attorney's fees, the court of appeals reversed the Martins' fee award. *Id.* This holding directly conflicts with *Goebel v. Brandley*, 76 S.W.3d 652 (Tex.App.-Houston [14th Dist.] 2002, no pet.), in which the court held that a suit to declare a boundary's location may properly be brought as a declaratory judgment action. We granted the Martins' petition for review to resolve this conflict among our courts of appeals.

II

The Texas Property Code provides that "[a] trespass to try title action is the method of determining title to lands, tenements, or other real property." TEX. PROP. CODE § 22.001. The Texas Declaratory Judgments Act provides that "
265 [a] person *265 interested under a deed . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. REM. CODE § 37.004(a). The parties disagree about these statutes' application when the sole question before the court involves determining the proper boundary line between adjoining properties.

We have said that boundary disputes *may* be tried as trespass-to-try-title actions, but not that they must. *Hunt v. Heaton*, 643 S.W.2d 677, 679 (Tex. 1982); *Plumb v. Stuessy*, 617 S.W.2d 667, 669 (Tex. 1981). We have never considered whether a boundary dispute may also be tried as a declaratory judgment action. These two statutory avenues differ significantly in both their proof elements and the relief they afford.

The Declaratory Judgments Act provides an efficient vehicle for parties to seek a declaration of rights under certain instruments, while trespass-to-try-title actions involve detailed pleading and proof requirements. *See* TEX. R. CIV. P. 783-809. To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned. *Plumb*, 617 S.W.2d at 668 (citing *Land v. Turner*, 377 S.W.2d 181, 183 (Tex. 1964)). The pleading rules are detailed and formal, and require a plaintiff to prevail on the superiority of his title, not on the weakness of a defendant's title. *Land*, 377 S.W.2d at 183.

The trespass-to-try-title statute was originally enacted in 1840 to provide a remedy for resolving title issues. TEX. PROP. CODE § 22.001(a) ("A trespass to try title action is the method of determining title to lands. . . ."). It also eliminated ejectment actions in Texas, which had traditionally been used to restore possession of property to a person legally entitled to it. *See* Tex. Prop. Code § 22.001(b); *see generally* 2 POWELL ON REAL

PROPERTY § 246[3] (1991). The statute is typically used to clear problems in chains of title or to recover possession of land unlawfully withheld from a rightful owner. *See Standard Oil Co. of Tex. v. Marshall*, 265 F.2d 46, 50 (5th Cir. 1959); *City of El Paso v. Long*, 209 S.W.2d 950, 954 (Tex.Civ.App.-El Paso 1947, writ ref'd n.r.e.).

The strict pleading and proof requirements applicable to trespass-to-try-title actions have sometimes produced harsh results. *See, e.g., Hunt*, 643 S.W.2d at 679 (holding that Hunt's failure to timely file his abstract showing chain of title was fatal to the trespass-to-try-title action he pled whether or not the case turned factually on the question of boundary), *Id.* at 680 (SONDOCK, J., concurring) (noting the "unnecessary technicalities" of trespass-to-try-title actions). To lessen these harsh effects, the Court has relaxed the trespass-to-try-title action's formal proof requirements when the sole dispute between the parties involves a boundary's location. *See Plumb*, 617 S.W.2d at 669. In *Plumb*, we recognized that a boundary dispute "may be tried by a statutory action of trespass to try title." *Id.* (citing *Schiele v. Kimball*, 194 S.W. 944 (Tex. 1917)). In such a case, a recorded deed is sufficient to show an interest in the disputed property without having to prove a formal chain of superior title. *See Plumb*, 617 S.W.2d at 669; *see also Brownlee v. Sexton*, 703 S.W.2d 797, 800 (Tex.App.-Dallas 1986, writ ref'd n.r.e.); *Rocha v. Campos*, 574 S.W.2d 233, 235-36 (Tex.Civ.App.-Corpus Christi, 1978, no writ). We articulated a test to determine if a case is
266 one of boundary: *266 "If there would have been no case but for the question of boundary, then the case is necessarily a boundary case even though it may involve questions of title." *Plumb*, 617 S.W.2d at 669. We have never indicated, though, that by lessening the trespass-to-try-title action's more formal proof requirements we intended to make boundary disputes a distinct cause of action. It is over this point that the parties disagree.

The Martins argue that this case does not involve a title dispute as contemplated by the trespass-to-try-title statute because the parties stipulated that their respective chains of title do not overlap. The Martins contend that the court is not determining substantive title rights but is merely declaring the boundary's location between adjoining properties. *See Goebel*, 76 S.W.3d at 656. The Amermans, on the other hand, contend this case is necessarily about title because both parties assert competing claims of ownership to the same thirty-foot strip of land *See VanZandt v. Holmes*, 689 S.W.2d 259, 261-62 (Tex.App.-Waco 1985, no writ); *Rocha*, 574 S.W.2d at 235. To answer this question, we first examine how the distinction between title and boundary disputes arose.

The distinction between formal trespass-to-try-title actions and disputes involving only a boundary determination was initially drawn as a means to determine whether this Court had subject matter jurisdiction over the case. Before 1929, we had no jurisdiction over appeals involving boundary determinations, but did have jurisdiction over appeals that involved questions of title. Act of Apr. 13, 1892, 22nd Leg., 1st C.S., ch. 15, 1892 Tex. Gen. Laws 25, *amended by* Act of Mar. 2, 1929, 41st Leg., R.S., ch. 33 § 1, 1929 Tex. Gen. Laws 68.[1] In determining the parameters of our jurisdiction, we explained that "[e]very action to try title to land may involve a question of boundary, but . . . this did not of itself make a boundary case." *Cox v. Finks*. 43 S.W. 1, 1 (Tex. 1897). We concluded that a case was one of boundary if the "whole litigation . . . gr[e]w out of a question of boundary. . . ." *Id.* at 2. Thus, we initially defined a "boundary case" not for the purpose of creating a separate cause of action but to respect the Legislature's statutory constraints on our jurisdiction. These constraints were abolished in 1929, and the jurisdictional underpinnings of the title/boundary distinction disappeared.

[1] "The judgment of the courts of civil appeals shall be conclusive in all cases on the facts of the case and a judgment of such

> courts shall be conclusive on facts and law in the following cases; nor shall a writ of error be allowed thereto from the supreme court, to-wit: . . . (2) All cases of boundary." Act of Apr. 13, 1892, 22nd Leg., 1st C.S., ch. 15, 1892 Tex. Gen. Laws 25, *amended by* Act of Mar. 2, 1929, 41st Leg., R.S., ch. 33 § 1, 1929 Tex. Gen. Laws 68.

The distinction between a title action and a boundary dispute came before the Court in a different context in *Permian Oil Co. v. Smith*, 107 S.W.2d 564 (Tex. 1937). There, we were asked to distinguish between title cases and boundary disputes for res judicata purposes. *Permian* concerned two suits between different parties involving the same piece of property. *Id.* at 566. The first suit resolved a boundary question. The parties to the later action claimed that the former boundary suit did not operate as a muniment of title and thus did not bar their subsequent title suit. *Id.* We recognized the longstanding jurisdictional distinction between title actions and boundary disputes, but concluded that this distinction was immaterial for purposes of determining the substantive res judicata question. *Id.* at 568 (noting that previous cases "were undoubtedly
267 influenced by the fact *267 that they were construing the effect of the [jurisdictional] statute"). Without the jurisdictional limitation guiding our analysis, we were unwilling to recognize a distinction between statutory trespass-to-try-title actions and boundary disputes simply because they turned on different evidentiary facts. *Id.* That location of a boundary was the sole issue in the first suit, we held, did not mean that title was not also at issue:

> The fact that on the trial boundary was the sole controversy controlling title does not keep the former judgment, which disposed of title, from binding the parties and their privies. In trespass to try title determination of the outcome of the suit through the fact of boundary does not alter the cause of action plead [sic] and disposed of by the judgment.

Id. The same principle was earlier stated in *Freeman v. McAninch*, where the Court held:

> [T]he fact that the determination of [title] may have depended on a question of boundary could not change the character of the vital issue in the case, for that was but a question of fact, to be considered like any other fact in determining whether the issue of title to the land should be decided in favor of the one party or the other. . . . The issue presented by the pleadings, and determined by the judgment, was one of title; and that . . . this depended on the fact of true locality of the boundary between the surveys, could not change the character of that issue.

27 S.W. 97, 98-100 (Tex. 1894).

Thus, although we have recognized a procedural distinction between trespass-to-try-title actions and boundary disputes for jurisdictional and evidentiary purposes, we have declined to draw a substantive distinction for purposes of determining claim preclusion. As we said in *Freeman*, " [q]uestions of boundary are never the subjects of litigation within themselves, but become so only when some right or title is thought to depend on their determination. . . ." *Id.* at 98. A boundary determination necessarily involves the question of title, else the parties would gain nothing by the judgment. *Id.* at 99 (stating that "if the issue of title . . . was not determined . . . it [would be] wholly unimportant where the boundary between the surveys was").

For the foregoing reasons, we again decline to recognize a substantive distinction between title and boundary issues, this time for the purpose of allowing alternative relief under the Declaratory Judgments Act. We conclude, as did the court of appeals, that the trespass-to-try-title statute governs the parties' substantive claims in this case. The statute expressly provides that it is *"the* method for determining title to . . . real property." TEX. PROP. CODE § 22.001(a) (emphasis added); *see Ely v. Briley*, 959 S.W.2d 723, 727 (Tex.App.-Austin 1998, no pet.); *Kennesaw Life Accid. Ins. Co. v. Goss*, 694 S.W.2d 115, 118 (Tex.App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). Accordingly, the Martins may not proceed alternatively under the Declaratory Judgments Act to recover their attorney's fees.

The Martins rely on language in *Brainard v. State*, 12 S.W.3d 6 (Tex. 1999), to support their argument that a declaratory judgment action is a viable method to resolve a boundary dispute. In *Brainard*, we were called upon to determine a boundary line as described by conflicting surveys. *Id.* at 12. We held that an award of attorney's fees was not appropriate because the suit arose out of a specific legislative resolution granting permission to sue the State, and that permission did not provide for a fee award. *Id.* at 29. We noted, however, that "a [declaratory judgment] is
268 certainly one way to resolve a *268 boundary dispute. . . ." *Id.* This statement, which was clearly dicta, has understandably generated confusion among our courts of appeals. *Compare Goebel*, 76 S.W.3d at 655-56 *with Amerman*, 83 S.W.3d at 863-64. More recently, in a case involving determination of a shoreline boundary, we properly termed the issue one of title and rejected the notion that declaratory relief was also available under the Declaratory Judgments Act:

> [T]he dispute in the present case is over title, not an enactment, and the Foundation's claim for declaratory relief [locating the shoreline boundary] is merely incidental to the title issues. In such circumstances, the Act does not authorize an award of attorney fees against the State.

John G. Marie Stella Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 289 (Tex. 2002). We disapprove our statement to the contrary, albeit dicta, in *Brainard*. 12 S.W.3d at 29. To the extent our courts of appeals have expressed a different view, we disapprove of those decisions. *See Goebel*, 76 S.W.3d 652; *see also Tarrant County v. Denton County*, 87 S.W.3d 159 (Tex.App.-Fort Worth 2002, pet. denied) (allowing boundary suits to be tried as declaratory-judgment actions without deciding the issue); *Mortgage Inv. Co. of El Paso v. Bauer*, 493 S.W.2d 339 (Tex.Civ.App.-El Paso 1973, writ ref'd n.r.e.) (same).

III

The Amermans, as cross-petitioners, contend that the trial court erred by failing to submit the case to the jury in the formal manner that traditional trespass-to-try-title claims require. The court of appeals concluded that the Amermans waived this point, and we agree. 83 S.W.3d at 861. Moreover, as we have said, the trespass-to-try-title action's more formal proof requirements do not apply in boundary disputes when there would have been no case but for the question of boundary. *Plumb*, 617 S.W.2d at 669.

The Amermans further contend that the evidence is legally insufficient to support the jury's determination that the proper boundary line was that set by the Martins' surveyor. We disagree, for the reasons the court of appeals expressed. 83 S.W.3d at 862-63.

IV

For the foregoing reasons, we affirm the court of appeals' judgment. 83 S.W.3d 858.

No. 95-0771
Supreme Court of Texas

Mayhew v. Town of Sunnyvale

964 S.W.2d 922 (Tex. 1998)
Decided Mar 13, 1998

No. 95-0771.

Argued October 24, 1996.

Decided March 13, 1998. Rehearing Overruled May 8, 1998.

Appeal from the 192nd District Court, Dallas
923 County, Merrill Hartman, J. *923

Don Black, P. Michael Jung, Dallas, Charles L. Siemon, Marcella Larsen, Boca Raton, FL, for Petitioners.

LaDawn H. Conway, Cole B. Ramey, Terry D. Morgan, Robert H. Freilich, Kansas City, MO, W. Alan Wright, Dallas, for Respondent.

925 *925

ABBOTT, Justice, delivered the opinion for a unanimous Court.

We are confronted with two primary questions in this regulatory takings case. First, we must determine the extent to which the Mayhews' claims are ripe for our consideration. Second, we must decide whether the denial of the Mayhews' planned development proposal violated their constitutional rights. While we conclude that the Mayhews' claims are ripe, we hold that the Town did not violate their constitutional rights. We reverse the court of appeals' judgment dismissing the Mayhews' claims, and we render judgment that the Mayhews take nothing.

I

The Town of Sunnyvale, a Texas general law municipal corporation with a population of approximately 2,000 people, is located approximately twelve miles east of the central business district of Dallas. The Town contains approximately 10,941 acres of land, but approximately 8,190 acres are currently vacant. The Town's first zoning ordinance, adopted in 1965, allowed residential development at a density of 3.6 units per acre. In 1973, in response to septic tank failures, the Town modified its zoning ordinance and enacted a one-acre minimum lot size requirement. However, when sanitary sewer facilities were later made available to the Town, the Town did not repeal its one-acre minimum lot requirement.

The Mayhew family owns approximately 1196 acres of land in Sunnyvale. From 1941 to 1965, the Mayhews acquired 850 acres of their property at a cost of $372,000.00. The Mayhews used this property for ranching for a number of years. In 1985 and 1986, the Mayhews purchased an additional 346 acres in the Town for development purposes. The Mayhews' property comprises 26% of the land available for residential development in the Town.

In 1985, the Mayhews began meeting with various Town officials seeking permission to proceed with a planned development with a density in excess of the then allowable one-dwelling-unit-per-acre
926 residential zoning. *926 The Mayhews told the Town a planned development would not be feasible under one-unit-per-acre zoning. In 1986, after meeting with the Mayhews, the Town

adopted a comprehensive plan providing for a projected population of 25,000 by the year 2006, and 30,000 to 35,000 persons by the year 2016. The Town also amended article XV of its zoning ordinances to allow, upon council approval, planned developments with densities in excess of one dwelling-unit per acre.

In July 1986, after spending over $500,000 conducting studies and preparing evaluative reports, the Mayhews submitted their planned development proposal to the Town. If the proposal was approved, the Mayhews planned to sell their property to the Trammel Crow Company for development. Because Trammel Crow would only develop the property if it could build a minimum of 3,600 units, the Mayhews requested approval to build between 3,650 and 5,025 units on their land, a density of over three units per acre.

The Town employed a professional planning and engineering firm to initially review the proposal. This firm, after finding that the proposal satisfied each of the requirements of the Town's zoning ordinance, recommended approval of the proposal. The proposal was then forwarded to the Town's planning and zoning commission.

While the commission was reviewing the Mayhews' application, the Town council passed a moratorium on planned developments, which was in effect until the Spring of 1987. Despite the moratorium, the commission continued to consider the Mayhews' application. After four months of consideration, the commission recommended denial of the Mayhews' application on November 20, 1986. In support of its recommendation, the commission noted that the development would severely impact the ability of the Town to provide adequate municipal services. The commission also reasoned that the Town had a very unique character and lifestyle that differed from the proliferation of multi-family and single-family homes on small lots in adjoining municipalities. According to the commission, a less dense use of the property was preferable.

The Town council appointed a negotiating committee of two Town councilmen, the Town mayor, and the Town attorney. The Mayhews met with the committee and both sides tentatively agreed to a compromise development of 3,600 units. Subsequently, on January 13, 1987, the Town council met to vote on the proposal. During the council meeting, Charles Mayhew, Jr. told the council that anything less than approval for 3,600 units would be considered an outright denial. Despite the prior compromise, the Town council voted to deny the Mayhews' development proposal by a four-to-one vote. A subsequent meeting to reconsider the planned development request was canceled by the Town.

In March 1987, the Mayhews sued the Town and the four individual council members who voted against their proposal, alleging that the refusal to approve the planned development violated their state and federal constitutional rights to procedural due process, substantive due process, and equal protection. The Mayhews further alleged that the Town's decision was a taking of their property without payment of just or adequate compensation. The Mayhews also brought various statutory claims.

The Town and the individual council members moved for summary judgment, which the district court granted. On appeal, the court of appeals affirmed the summary judgment in favor of the individual council members, and also affirmed the summary judgment in favor of the Town on the Mayhews' statutory claims. However, the appellate court reversed the summary judgment on the Mayhews' constitutional claims against the Town, concluding that material fact questions existed regarding whether the Town violated the Mayhews' state and federal constitutional rights. *Mayhew v. Town of Sunnyvale,* 774 S.W.2d 284, 286 (Tex.App. — Dallas 1989, writ denied), *cert. denied,* 498 U.S. 1087, 111 S.Ct. 963, 112 L.Ed.2d 1049 (1991).

Upon remand, the district court held a bench trial. The court heard testimony from thirty-five witnesses, most of whom were experts. At the conclusion of the trial, the district court made
927 numerous findings of fact *927 and conclusions of law, including findings that:

> 26. The Mayhew Ranch Planned Development was well-planned and satisfied all of the requirements contained in Article XV and the Zoning Ordinance of the Town of Sunnyvale.
>
> 36. Adequate steps were taken in the design of the Mayhew Ranch Planned Development to protect the public health, safety, welfare, and morals of the Town of Sunnyvale and its citizens.
>
> 40. Growth and development in the Town of Sunnyvale cannot possibly reach the population projection in the Comprehensive Plan of the Town of Sunnyvale under the Town's one-acre zoning.
>
> 78. The Planning and Zoning Commission's recommendations to the Town Council of November 20, 1986 had no basis in fact and were not rational.
>
> 82. The Town of Sunnyvale's one-acre zoning does not bear any factual relationship to valid planning principles or objectives.
>
> 87. The existing development in the Town of Sunnyvale is suburban and urban and any "rural" atmosphere that exists is the result of the existence of undeveloped private property.
>
> 99. In denying the application for planned development approval for the Mayhew Ranch Planned Development, the Town of Sunnyvale has refused to allow economically viable development on [the Mayhews'] property with the intention to prevent all development . . . and thereby impose a servitude for the benefit of the public.
>
> 101. In denying the application for planned development approval . . ., and in enacting numerous moratoria on applications for consideration of planned development approval, the Town of Sunnyvale has acted pursuant to an official policy not to allow development with a density of greater than one dwelling unit per acre.
>
> 106. Prior to the Town Council's action to deny the application for [the] planned development . . ., the [Mayhews'] property had a fair market value of at least $9,700,000.00.
>
> 107. The value of the [Mayhews'] property on January 13, 1987, with development approval . . . and without the application of the one-acre zoning requirement, would have been greater than $15,000,000.00.
>
> 108. As a result of the Town Council's denial of the application for [the] planned development . . ., and the continued application of the one-acre zoning, the fair market value of the [Mayhews'] property was reduced to $2,400,000.00.
>
> 115. The minimum residential density necessary for economic viability on [the Mayhews'] property is approximately 3,600 dwelling units or three dwelling units per acre.
>
> 117. Agriculture is not an economically viable use of [the Mayhews'] property.

> 118. No knowledgeable investor would purchase [the Mayhews'] property as it is currently zoned.
>
> 120. The Town Council's decision to deny the application for [the] planned development . . . has the practical effect of depriving [the Mayhews] of the only economically viable use of their property.
>
> 121. The result of the Town Council's decision to deny the application for [the] planned development . . . is to destroy the value of [the Mayhews'] property.
>
> 131. The actions of the Town of Sunnyvale reveal a pattern and practice which
>
> demonstrates the intent of the Town of Sunnyvale to deny any application for developmental approval with a density greater than one dwelling unit per acre.
>
> 133. The Town of Sunnyvale has closed the door on future reapplication by [the Mayhews] at a realistic or economically viable density.

Based on its findings, the district court concluded that the case was ripe for adjudication and that the Mayhews should prevail on their procedural due process, substantive due process, and equal protection claims under the federal and state constitutions. The district court further concluded that the Town's decision to deny the application for the planned development was an unconstitutional taking under both the federal and state *928 constitutions. The court rendered judgment in favor of the Mayhews, awarding $5 million in damages, $2.3 million in prejudgment interest, approximately $1.2 million in attorney's fees, and costs.

The court of appeals reversed the district court's judgment and dismissed the Mayhews' claims against the Town, holding that none of the claims was ripe for review. *Town of Sunnyvale v. Mayhew,* 905 S.W.2d 234 (Tex.App. — Dallas 1994). In a supplemental opinion, the court of appeals addressed the merits of the Mayhews' claims in light of this Court's opinion in *Taub v. City of Deer Park,* 882 S.W.2d 824 (Tex. 1994), *cert. denied,* 513 U.S. 1112, 115 S.Ct. 904, 130 L.Ed.2d 787 (1995). The court concluded that, even if the Mayhews' claims were ripe, the evidence was factually insufficient to support the trial court's findings. 905 S.W.2d at 259-68.

We granted the Mayhews' application for writ of error to consider whether their claims were ripe for review and whether judgment should be rendered on the Mayhews' state and federal constitutional claims.

II

Our initial inquiry is whether the Mayhews' claims are ripe for this Court's review. Ripeness is an element of subject matter jurisdiction. *State Bar of Texas v. Gomez,* 891 S.W.2d 243, 245 (Tex. 1994); *City of Garland v. Louton,* 691 S.W.2d 603, 605 (Tex. 1985). As such, ripeness is a legal question subject to de novo review that a court can raise sua sponte. *Texas Ass'n of Business v. Texas Air Control Bd.,* 852 S.W.2d 440, 444-45 (Tex. 1993) (subject matter jurisdiction cannot be waived and may be raised for the first time on appeal by the parties or by the court); *North Alamo Water Supply Corp. v. Texas Dep't of Health,* 839 S.W.2d 455, 457 (Tex.App. — Austin 1992, writ denied) (issue of court's jurisdiction presented a question of law). *See also Reahard v. Lee County,* 30 F.3d 1412, 1415 (11th Cir. 1994)(ripeness is a jurisdictional issue subject to a de novo review), *cert. denied,* 514 U.S. 1064, 115 S.Ct. 1693, 131 L.Ed.2d 557 (1995); *Christensen v. Yolo County Bd. of Supervisors,* 995 F.2d 161, 163-64 (9th Cir. 1993)(ripeness is a question of law subject to de novo review); *Herrington v. County of Sonoma,* 857 F.2d 567, 568 (9th Cir. 1988)(same), *cert. denied,* 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).

The ripeness requirement emanates, in part, from the separation of powers provision set out in article II, section 1 of the Texas Constitution. Under the separation of powers doctrine, courts are without jurisdiction to issue advisory opinions because such is the function of the executive department, not the judiciary. *Texas Ass'n of Business,* 852 S.W.2d at 444; s *ee also Public Util. Comm'n v. Houston Lighting Power Co.,* 748 S.W.2d 439 (Tex. 1987)("A court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe."); *City of Garland,* 691 S.W.2d at 605 (same); *Coalson v. City Council of Victoria,* 610 S.W.2d 744, 747 (Tex. 1980)(Texas Constitution precludes district courts from giving advisory opinions in prematurely filed actions).

The ripeness doctrine conserves judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote disputes. *See Browning-Ferris, Inc. v. Brazoria County,* 742 S.W.2d 43, 49 (Tex.App. — Austin 1987, no writ). In this regard, the state ripeness doctrine is similar to the federal ripeness doctrine in that it has both constitutional and prudential dimensions.

This Court has never addressed the ripeness of constitutional challenges to land use regulation. We are aware of only one published Texas decision, *City of El Paso v. Madero Dev.,* 803 S.W.2d 396, 400 (Tex.App. — El Paso 1991, writ denied), *cert. denied,* 502 U.S. 1073, 112 S.Ct. 970, 117 L.Ed.2d 135 (1992), in which the ripeness of regulatory takings and related constitutional claims was analyzed. In that case, the court of appeals relied heavily on federal law to hold that the landowner's claims were not ripe. We agree that we should look to the experience of the federal courts in determining the ripeness of
929 constitutional challenges *929 to land-use regulations.[1] *Cf. Texas Ass'n of Business,* 852 S.W.2d at 444 ("Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.").

[1] It is possible that we are compelled to reach this result, at least with respect to the Mayhews' federal claims. While state procedural law generally determines the manner in which a federal question is to be presented in state court, that is not the case if federal substantive law defines its own procedural matrix. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-24, at 166 (2d ed. 1988). Because the United States Supreme Court has stated that the "final decision" prudential ripeness requirement "follows from the principle that only a regulation that 'goes too far' results in a taking under the Fifth Amendment," *Suitum v. Tahoe Regional Planning Agency,* ___ U.S. ____ , ____ , 117 S.Ct. 1659, 1665, 137 L.Ed.2d 980 (1997) (citations omitted), a persuasive argument could be made that the "final decision" aspect of ripeness is not independent of federal substantive law. *See also MacDonald, Sommer Frates v. Yolo County,* 477 U.S. 340, 348, 106 S.Ct. 2561, 2565-66, 91 L.Ed.2d 285 (1986)(final decision is an "essential prerequisite" of a regulatory takings claim). In any event, we need not determine whether we are compelled by federal supremacy to rely on federal law because, in determining the ripeness of the Mayhews' regulatory takings claims in this case, we apply federal jurisprudence.

A

The federal courts have recognized, as a prudential matter, an essential prerequisite to the ripeness of federal regulatory takings and related constitutional claims. *Suitum v. Tahoe Regional Planning Agency,* ___ U.S. ____ , ____ _ ____ n. 7, 117 S.Ct. 1659, 1664-65 n. 7, 137 L.Ed.2d 980 (1997). This "essential prerequisite" requires "a final and authoritative determination of the type and intensity of development legally permitted on

the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer Frates v. Yolo County,* 477 U.S. 340, 348, 106 S.Ct. 2561, 2565-66, 91 L.Ed.2d 285 (1986) (citations omitted). In other words, the federal courts have reasoned that a court cannot determine whether a taking or other constitutional violation has occurred until the court can compare the uses prohibited by the regulation to any permissible uses that may be made of the affected property.

Accordingly, in order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue.[2] *Suitum,* ___ U.S. at ____ , 117 S.Ct. at 1665; *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985). A "final decision" usually requires both a rejected development plan and the denial of a variance from the controlling regulations. *Hamilton Bank,* 473 U.S. at 187-88, 105 S.Ct. at 3117 *; see also MacDonald,* 477 U.S. at 351-52 n. 8, 106 S.Ct. at 2567-68 n. 8 (case was not ripe when a single "intense" subdivision proposal was rejected because a "meaningful application" had not been made); *Hodel v. Virginia Surface Mining Reclamation Ass'n,* 452 U.S. 264, 293-97, 101 S.Ct. 2352, 2369-71, 69 L.Ed.2d 1 (1981)(Court refused to consider takings claim based on general regulatory provision that had not been applied to specific properties and from which no administrative relief had been sought); *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)("as-applied" constitutional challenge was not ripe because the property owners had not yet submitted a plan for the development of their property).

[2] Moreover, before a regulatory takings claim can be maintained in federal court, a plaintiff must seek compensation through the procedures the state has provided for doing so. *Suitum,* ___ U.S. at ____ , 117 S.Ct. at 1665; *Hamilton Bank,* 473 U.S. at 194-95, 105 S.Ct. at 3120-21. This requirement does not apply in this case.

However, futile variance requests or re-applications are not required. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1012 n. 3, 112 S.Ct. 2886, 2891 n. 3, 120 L.Ed.2d 798 (1992); *MacDonald,* 477 U.S. at 352 n. 8, 106 S.Ct. at 2567-68 n. 8; *Kawaoka v. City of Arroyo Grande,* 17 F.3d 1227, 1232 (9th Cir.), *cert. denied,* 513 U.S. 870, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994); *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 504 (9th Cir. 1990), *cert. denied,* 930 *930 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991); *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1575 (11th Cir. 1989); *Hoehne v. County of San Benito,* 870 F.2d 529, 534-35 (9th Cir. 1989); *Herrington v. County of Sonoma,* 857 F.2d at 569-70; *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, 1454-55 (9th Cir.), *modified on other grounds,* 830 F.2d 968 (9th Cir. 1987), *cert. denied,* 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988).

Moreover, the term "variance" is "not definitive or talismanic;" it encompasses "other types of permits or actions [that] are available and could provide similar relief." *Southern Pacific,* 922 F.2d at 503; *see also Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1541 (11th Cir.) (aggrieved landowner must "have sought variances or pursued alternative, less ambitious development plans"), *cert. denied,* 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991); *Landmark Land Co. of Oklahoma, Inc. v. Buchanan,* 874 F.2d 717, 721 (10th Cir. 1989)(claim not ripe until initial permit application denied and some effort made to "compromise" with the city to allow some level of development). The variance requirement is therefore applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to "grant different forms of relief or make policy decisions which might abate the alleged taking." *Southern Pacific,* 922 F.2d at 503.

The same "final decision" requirement applies to determine the ripeness of as-applied due process and equal protection challenges to a land-use decision. *See, e.g., Hamilton Bank,* 473 U.S. at 199-200, 105 S.Ct. at 3123-24 (concluding that due process claim under Fourteenth Amendment was not ripe because the requisite variance had not been sought to establish a "final decision," and utilizing the same rationale in analyzing the ripeness of the takings claim and the due process claim); *Taylor Inv., Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1292-95 (3d Cir. 1993)(final decision rule of *MacDonald* and *Hamilton Bank* applies to substantive due process, equal protection, and procedural due process claims), *cert. denied,* 510 U.S. 914, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993); *Bigelow v. Michigan Dep't of Natural Resources,* 970 F.2d 154, 159-60 (6th Cir. 1992)(procedural due process claim, which was related to plaintiff's takings claim, subject to the finality rule); *Eide v. Sarasota County,* 908 F.2d 716, 725 (11th Cir. 1990)(finality requirement applies to substantive due process claim), *cert. denied,* 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991); *Herrington,* 857 F.2d at 569 (final decision requirement applies to substantive due process and equal protection claims); *Norco Constr., Inc. v. King County,* 801 F.2d 1143, 1145 (9th Cir. 1986)(final decision requirement applies to procedural due process and equal protection claims).

However, a final decision on the application of the zoning ordinance to the plaintiff's property is not required if the plaintiff brings a facial challenge to the ordinance. *See Pennell v. City of San Jose,* 485 U.S. 1, 9-14, 108 S.Ct. 849, 856-59, 99 L.Ed.2d 1 (1988); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 386, 47 S.Ct. 114, 117-18, 71 L.Ed. 303 (1926); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights,* 949 F.2d 890, 894-95 (6th Cir. 1991); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield,* 907 F.2d 239, 242-43 (1st Cir. 1990); *Beacon Hill Farm Assocs. II v. Loudoun County Bd. of Supervisors,* 875 F.2d 1081, 1084-85 (4th Cir. 1989).

B

The Mayhews alleged (1) just compensation takings claims, (2) "fails to substantially advance" takings claims, (3) substantive due process and due course claims, (4) equal protection claims, and (5) procedural due process and due course claims under the United States Constitution and Texas Constitution regarding the Town's denial of their planned development application for 3,600 units. The Mayhews also argue in their application for writ of error that their constitutional claims challenge the Town's continued application and enforcement of a blanket one-acre zoning designation on their property. We conclude, however, that this challenge is not independent from their claims stemming from the Town's denial of their planned development proposal. The record in this case clearly indicates that the Mayhews were only interested in the Town approving their development *931 request for 3,600 units. As Charles Mayhew, Jr. testified, anything less than 3,600 units, the Mayhews believed, was an outright denial of their application. The Mayhews' very theory at trial was that the only economically viable use of their property was to develop it in accordance with the development proposal that the Town rejected. While the Town's general one-acre zoning requirement almost certainly contributed to the Town's rejection of the Mayhews' application, the one-acre zoning requirement itself did not cause a discrete injury separate from the harm the Mayhews suffered as a result of the denial of their planned development proposal because the Mayhews had no intention of pursuing a development with less than 3,600 units.

The Town maintains that the Mayhews' claims regarding the denial of their planned development application are not ripe because the Mayhews submitted only one planned development application and did not thereafter reapply for

development or submit a "variance." The Mayhews counter that, under the circumstances of this case, their planned development application and amended request for 3,600 units were sufficient, and that any further applications would have been futile. We agree with the Mayhews.

After the Town denied the Mayhews' planned development application for 3,600 units, the Mayhews did not thereafter request a variance. Moreover, the Mayhews did not file another planned development application. Instead, the Mayhews filed this suit. Normally, their failure to reapply or seek a variance would be fatal to the ripeness of their claims. *See MacDonald,* 477 U.S. at 351, 106 S.Ct. at 2567; *Hamilton Bank,* 473 U.S. at 188-91, 105 S.Ct. at 3117-19. However, under the unique circumstances of this case, we conclude that the Mayhews' constitutional challenges to the Town's denial of their planned development application for 3,600 units are ripe for this Court's review.

A planned development is not a typical request for a zoning change; the density, type, and location of particular uses in the development are left to the planning process and are determined through negotiations between the developer and the town. The evidence in this case establishes the extent to which the Mayhews worked with the Town in attempting to have their development approved. The Mayhews originally requested approval to build between 3,650 and 5,025 units on their land. They spent over a year in negotiations with the Town, and expended over $500,000 preparing and developing the application. The Mayhews presented the project to the Town planning staff, the Town planning and zoning committee, and the Town council. After receiving a negative response from the planning and zoning committee, the Mayhews met with Town council members, and, in an effort to compromise, agreed to alter their application. The Mayhews then submitted a modified application to the Town council, which the council rejected.

The modified application that the Mayhews presented to the Town council requested 3,600 units, a reduction from their original request for approval. Such a compromise proposal can sometimes be sufficient to satisfy the variance requirement. *Executive 100, Inc.,* 922 F.2d at 1540 (aggrieved landowner must "have sought variances or pursued alternative, less ambitious development plans"); *Landmark Land Co.,* 874 F.2d at 721 (claim not ripe until initial permit application denied and some effort made to "compromise" with the city to allow some level of development).

Moreover, this modified application was not the most profitable use envisioned by the Mayhews, but rather the minimum number of units the Mayhews believed necessary to make an economically viable use of their land. In fact, the very theory espoused by the Mayhews at trial was that only improvements along the lines of their 3,600 unit proposed planned development would avert a regulatory taking. In other words, the Mayhews alleged that anything less than the Town allowing their planned development would deny the only economically viable use of their property.

The United States Supreme Court has indicated that such a claim may be ripe without the necessity of seeking a variance or filing a subsequent application. In *MacDonald,* after the
932 county rejected the applicant's single *932 proposal to subdivide the property into 159 single-family and multi-family residential lots, the applicant immediately sued, alleging that the county had restricted the property to an open-space agricultural use, thereby appropriating the property. *MacDonald,* 477 U.S. at 342-44, 106 S.Ct. at 2562-64. Because the county's only action was its rejection of a single subdivision proposal, the Supreme Court held that the applicant's claim that the county had deprived it of all use of its property was not ripe. In such a situation, the Court reasoned that the applicant had not received the county's "'final, definitive position regarding how it will apply the regulations at issue to the

particular land in question.'" *Id.* at 351, 106 S.Ct. at 2567 (quoting *Hamilton Bank,* 473 U.S. at 191, 105 S.Ct. at 3118-19). But the Court noted that the applicant did not "contend that *only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking.*" *Id.* at 352 n. 8, 106 S.Ct. at 2567-68 n. 8 (emphasis added). The Supreme Court accordingly implied that the result may have been different if the applicant's complaint had been that the only way to avert a regulatory taking was for the county to approve the subdivision proposal.

Of course, that is exactly the Mayhews' complaint. The Mayhews allege that anything less than approval for 3,600 units on their property constitutes a regulatory taking. The ripeness doctrine does not require a property owner, such as the Mayhews, to seek permits for development that the property owner does not deem economically viable. *See Beure-Co. v. United States,* 16 Cl.Ct. 42, 51 n. 11 (1988). We accordingly conclude that, under the circumstances of this case, the Mayhews were not required to submit additional alternative proposals, after a year of negotiations and $500,000 in expenditures, to ripen this complaint.

Any other holding would require the Mayhews to expend their own time and resources pursuing, and the Town's time and resources considering, a development proposal that the Mayhews would never actually develop. Requiring such a wasteful expenditure of resources would violate the Supreme Court's admonition that a property owner is "not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination." *MacDonald,* 477 U.S. at 352 n. 7, 106 S.Ct. at 2567-68 n. 7. The Town clearly was not going to approve the Mayhews' development proposal for 3,600 units, making a subsequent application or variance request for 3,600 units a futile act. We therefore hold that the Mayhews' claims that the Town violated their constitutional rights by denying their planned development proposal for 3,600 units are ripe for this Court's review.

III

The Mayhews brought five separate claims against the Town under the federal and state constitutions, alleging "fails to substantially advance" takings claims, "just compensation" takings claims, substantive due process and due course claims, equal protection claims, and procedural due process and due course claims. The Mayhews urged in their application for writ of error that Texas takings jurisprudence follows the federal standards. Accordingly, for purposes of this case, we assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards. *Cf. Tilton v. Marshall,* 925 S.W.2d 672, 677 n. 6 (Tex. 1996)(assuming without deciding that the state and federal free exercise guarantees were coextensive with respect to relator's claims because relator did not demonstrate that the provisions should be applied differently).

Before proceeding to analyze the Mayhews' five constitutional claims, we must consider the proper effect of the findings of fact made by the district court in this case. Although determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues, the ultimate question of whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact. *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 804 (Tex. 1984); *see also Hunt v. City of San Antonio,* 462 S.W.2d 536, 933 539 (Tex. 1971); *DuPuy v. City of Waco,* 396 S.W.2d 103, 110 (Tex. 1965). In resolving this legal issue, we consider all of the surrounding circumstances. *City of College Station,* 680 S.W.2d at 804; *see also Hunt,* 462 S.W.2d at 539; *City of Bellaire v. Lamkin,* 159 Tex. 141, 317 S.W.2d 43, 45 (1958); *City of*

Waxahachie v. Watkins, 154 Tex. 206, 275 S.W.2d 477, 481 (1955). While we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property, *cf. Republican Party of Texas v. Dietz,* 940 S.W.2d 86, 91 (Tex. 1997), the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law.[3]

[3] The United States Supreme Court apparently also views the ultimate determinations in takings cases as a legal issue. *See United States v. Causby,* 328 U.S. 256, 259, 66 S.Ct. 1062, 1064-65, 90 L.Ed. 1206 (1946)(accepting Court of Claims' factual conclusion that the existence of government airplanes in the airspace immediately above the property destroyed its value while reserving for itself the legal conclusion of whether a compensable taking occurred under the Fifth Amendment).

A. REGULATORY TAKING CLAIM

The Just Compensation Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." This prohibition has been incorporated through the Fourteenth Amendment to apply to the individual states. *Williamson Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 175 n. 1, 105 S.Ct. 3108, 3110-11 n. 1, 87 L.Ed.2d 126 (1985); *Chicago, B. Q.R. Co. v. Chicago,* 166 U.S. 226, 241, 17 S.Ct. 581, 586, 41 L.Ed. 979 (1897). Similarly, article I, section 17 of the Texas Constitution provides, in pertinent part, that no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . ."

Takings can be classified as either physical or regulatory takings. Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property. *See Yee v. City of Escondido,* 503 U.S. 519, 522, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 153 (1992). The Mayhews do not claim that the Town has physically taken their property. Rather, the Mayhews allege that the denial of their planned development constitutes a regulatory taking.

Zoning decisions are vested in the discretion of municipal authorities; courts should not assume the role of a super zoning board. *Goss v. City of Little Rock,* 90 F.3d 306, 308 (8th Cir. 1996); *Burns v. City of Des Peres,* 534 F.2d 103, 108 (8th Cir.), *cert. denied,* 429 U.S. 861, 97 S.Ct. 164, 50 L.Ed.2d 139 (1976). However, despite the discretion afforded to municipal authorities, zoning decisions must comply with constitutional limitations. As a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance "does not substantially advance legitimate state interests" or it denies an owner all "economically viable use of his land." *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). *See also Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309, 2316-17, 129 L.Ed.2d 304 (1994); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016, 112 S.Ct. 2886, 2893-94, 120 L.Ed.2d 798 (1992); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 485, 107 S.Ct. 1232, 1241-42, 94 L.Ed.2d 472 (1987).

The Mayhews allege, and the district court found, that the denial of the Mayhews' planned development did not substantially advance legitimate state interests and amounted to a taking because all economically viable use of their property was denied. We first analyze whether the Town's actions substantially advance legitimate governmental interests before determining whether the Town's actions denied the Mayhews all economically viable use of their property.

1. *Substantially Advance Legitimate Interests*

A property regulation must "substantially advance" a legitimate governmental interest to pass constitutional muster. *See, e.g., Dolan,* 512 U.S. at 385, 114 S.Ct. at 2316-17 ; *Nollan,* 483 U.S. at 834, 107 S.Ct. at 3147. *See also City of College Station,* 680 S.W.2d at 805 (property regulation must be "substantially related" to a legitimate goal); *Hunt,* 462 S.W.2d at 539 (same); *Watkins,* 275 S.W.2d at 481 (same); *Lombardo,* 73 S.W.2d at 485 (same). While it is clear that a zoning ordinance that does not substantially advance a legitimate state interest constitutes a taking, the standards for determining what constitutes a legitimate state interest or what relation between a regulation and the state interest satisfies the "substantially advance" requirement in a regulatory takings case has not been clarified by the United States Supreme Court. *See, e.g., Nollan,* 483 U.S. at 834, 107 S.Ct. at 3147.

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The Supreme Court has, however, indicated that "a broad range of governmental purposes and regulations" will satisfy these requirements. *Id.* at 834-35, 107 S.Ct. at 3147-48. Specifically, the Supreme Court has noted that the following state interests are legitimate state interests: protecting residents from the "ill effects of urbanization"; *Agins,* 447 U.S. at 261, 100 S.Ct. at 2141-42; enhancing the quality of life; *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 129, 98 S.Ct. 2646, 2661-62, 57 L.Ed.2d 631 (1978); and protecting a beach system for recreation, tourism, and public health; *Keystone,* 480 U.S. at 488, 107 S.Ct. at 1243-44; *Esposito v. South Carolina Coastal Council,* 939 F.2d 165, 169 (4th Cir. 1991), *cert. denied,* 505 U.S. 1219, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992).

In *Agins,* the City of Tiburon adopted a zoning ordinance governing development of open space land that limited the plaintiffs to building between one and five single-family residences on the five acres of land which they had previously purchased for residential development. 447 U.S. at 257, 100 S.Ct. at 2139-40. The Court held that protecting the residents of Tiburon from the ill effects of urbanization by precluding the conversion of open-space land to urban uses was a legitimate government purpose. *Id.* at 261, 100 S.Ct. at 2141-42. *Cf. Penn Central Transp. Co.,* 438 U.S. at 129, 98 S.Ct. at 2661-62 (preservation of desirable aesthetic features); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974); *Berman v. Parker,* 348 U.S. 26, 32-33, 75 S.Ct. 98, 102-03, 99 L.Ed. 27 (1954); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 394-95, 47 S.Ct. 114, 120-21, 71 L.Ed. 303 (1926); *see also Christensen v. Yolo County Bd. of Supervisors,* 995 F.2d 161, 165 (9th Cir. 1993)(preservation of agricultural uses of land a legitimate state interest); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield,* 907 F.2d 239, 244-45 (1st Cir. 1990)(controlling both the rate and character of community growth a legitimate government purpose); *Pompa Construction Corp. v. City of Saratoga Springs,* 706 F.2d 418, 422 (2d Cir. 1983)(discouraging conversion of open-space land to urban uses a legitimate state interest). Such zoning ordinances benefit "the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas." *Agins,* 447 U.S. at 262, 100 S.Ct. at 2142.

The "substantial advancement" requirement examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. *See Yee v. City of Escondido,* 503 U.S. 519, 530, 112 S.Ct. 1522, 1529-30, 118 L.Ed.2d 153 (1992); *see also generally Nollan,* 483 U.S. at 837, 107 S.Ct. at 3148-49; *Esposito,* 939 F.2d at 169. This requirement is not, however, equivalent to the "rational basis" standard applied to due process and equal protection claims. *Nollan,* 483 U.S. at 834 n. 3, 107 S.Ct. at 3147 n. 3. The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective. *Id.*

The Town's denial of the Mayhews' planned development application passes constitutional muster under this standard. In making this determination, we do not review the wisdom of the Town's decision. S *ee Smithfield Concerned Citizens,* 907 F.2d at 245. Rather, we are concerned only with whether the decision satisfies
935 constitutional standards. *935

The Mayhews allege that the real reason behind the denial of their development application was to have their property serve as "borrowed" open space for the residents of the Town who primarily live on less than one-acre lots. In support of this contention, the Mayhews presented evidence negating some of the reasons given by the planning and zoning commission for the denial of their development application. For instance, the Mayhews presented evidence establishing, and the district court found, that sanitary sewer facilities would not be a problem for the Mayhews' planned development because the local sewage plant was operating in full compliance with EPA guidelines and had enough capacity to serve the additional residences contemplated in the Mayhews' planned development.

But the Town's planning and zoning commission came forth with a number of separate reasons for the denial of the Mayhews' application, several of which substantially advance legitimate state interests. The Town denied the development application in part because of the impact the development would have on the overall character of the community and the unique character and lifestyle of the Town which is different from that of adjoining municipalities where there is a proliferation of multi-family and single-family homes on small lots. Under the Supreme Court's decision in *Agins,* concern for such urbanization effects is clearly a legitimate state interest.

We also conclude that the denial of the Mayhews' development application substantially advances the Town's legitimate concern for protecting the community from the ill effects of urbanization. The Mayhews requested a planned development with 3,600 units in a Town with a population of only approximately 2,000 residents. Photographs in the record show that the Town is uniquely rural and suburban, with undivided two lane roads, clusters of trees, lakes and ponds, and houses on large lots. This community would change drastically if a large planned development with at least three residences per acre was built. The Mayhews' planned development would result in an estimated population increase of between 10,000 and 15,000 persons, more than quadrupling the population of the Town. Simply put, the Town has a substantial interest in preserving the rate and character of community growth, and its action in denying the Mayhews' planned development furthers those interests.

2. *Just Compensation Takings Claim*

Our conclusion that the Town's action substantially advances a legitimate state interest does not end the takings inquiry, however. A compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015-19 n. 8, 112 S.Ct. 2886, 2893-95 n. 8, 120 L.Ed.2d 798 (1992); *see also Taub v. City of Deer Park,* 882 S.W.2d 824, 826 (Tex. 1994), *cert. denied,* 513 U.S. 1112, 115 S.Ct. 904, 130 L.Ed.2d 787 (1995); *City of Austin v. Teague,* 570 S.W.2d 389, 393 (Tex. 1978).

A restriction denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless. *See, e.g., Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309, 2316-17, 129 L.Ed.2d 304 (1994); *Lucas,* 505 U.S. at 1015-16, 1020, 112 S.Ct. at 2893-94; *Taub,* 882 S.W.2d at 826; *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 806 (Tex. 1984); *Teague,* 570 S.W.2d at 393. Determining

whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action.

In contrast, determining whether the government has unreasonably interfered with a landowner's right to use and enjoy property requires a consideration of two factors: the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations. *See Lucas,* 505 U.S. at 1019 n. 8, 112 S.Ct. at 2895 n. 8; *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. The first factor, the 936 economic impact of the regulation, *936 merely compares the value that has been taken from the property with the value that remains in the property. *Keystone,* 480 U.S. at 497, 107 S.Ct. at 1248. The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. *Andrus v. Allard,* 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979); *see also Moore v. City of Costa Mesa,* 886 F.2d 260, 263 (9th Cir. 1989), *cert. denied,* 496 U.S. 906, 110 S.Ct. 2588, 110 L.Ed.2d 269 (1990). The second factor is the investment-backed expectation of the landowner. The existing and permitted uses of the property constitute the "primary expectation" of the landowner that is affected by regulation. *Penn Central,* 438 U.S. at 136, 98 S.Ct. at 2665; *see also Lucas,* 505 U.S. at 1017 n. 7, 112 S.Ct. at 2894 n. 7 (owner's reasonable expectations shaped by uses permitted by state law); *Esposito v. South Carolina Coastal Council,* 939 F.2d 165, 170 (4th Cir. 1991), *cert. denied,* 505 U.S. 1219, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992)("the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel.'") (quoting *Penn Central,* 438 U.S. at 136, 98 S.Ct. at 2665). Knowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations. *See Pompa Construction Corp. v. City of Saratoga Springs,* 706 F.2d 418, 424-25 (2d Cir. 1983).

The Town urges that its rejection of the Mayhews' application did not unconstitutionally deprive them of their property. The Town first contends that the district court found that the Mayhews' property retained a value of at least $2.4 million following the denial of the planned development application; thus, according to the Town, the property's value was not totally destroyed. The Town next urges that the denial of the development request did not unreasonably interfere with the Mayhews' property rights because the Mayhews had no right to have their property "up-zoned" for a greater density of development. In other words, the Town asserts that the Mayhews had no reasonable investment-backed expectation to lose. The Town also maintains that the Mayhews were not singled out unfairly through the denial of the planned development proposal. Instead, the Town claims that the zoning applied evenly to all property owners in the Town and the Town denied applications other than just the Mayhews' proposal.[4]

> [4] As Justice Scalia has observed, "Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the Takings Clause] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation would be) the source of the social problem, it cannot be said that he has been singled out unfairly." *Pennell v. City of San Jose,* 485 U.S. 1, 20, 108 S.Ct. 849, 861-62, 99 L.Ed.2d 1 (1988)(Scalia, J., dissenting).

The Mayhews counter, however, that this is not the typical denial of an up-zoning application. The Mayhews point out that the district court found

that the only economically viable use of this property was to construct 3,600 residential units. The district court also found that agriculture was not an economically viable use of the property. Finally, the district court found that, with one-acre zoning, it would take a minimum of 150 years before the Mayhews could completely develop their property. Accordingly, the district court found that no reasonable investor would purchase the Mayhews' property.

We first must consider the effect of these fact-findings relied on by the Mayhews. As discussed previously, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law, but we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property. Under substantive law, a regulatory taking occurs when governmental regulations deprive the owner of all economically viable use of the property or totally destroy the property's value. *Dolan,* 512 U.S. at 385, 114 S.Ct. at 2316-17; *Lucas,* 505 U.S. at 1015-16, 112 S.Ct. at 2893; *Taub,* 882 S.W.2d at 826. Some courts have made an alternative pronouncement that a taking occurs when the government does not allow any use of the property
937 that is sufficiently desirable to permit *937 the property owner to sell the property. *See, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 95 F.3d 1422, 1433 (9th Cir. 1996), *petition for cert. filed,* 66 U.S.L.W. 3509 (U.S. Jan. 26, 1998)(No. 97-1235); *Park Ave. Tower Assoc. v. City of New York,* 746 F.2d 135, 139 (2d Cir. 1984), *cert. denied,* 470 U.S. 1087, 105 S.Ct. 1854, 85 L.Ed.2d 151 (1985). The district court's findings that there was no economically viable use of the property and that no reasonable investor would purchase the property purport to decide the ultimate legal issue of whether a taking has occurred. This, however, involves a question of law, and we therefore owe no deference to the trial court's "findings" in this regard. We will instead focus on the district court's underlying factual determinations regarding the extent of the governmental intrusion and the diminution in the property's value in determining whether the Town has taken the Mayhews' property without just compensation.

The relevant factual findings demonstrate that the Town has not totally destroyed all value of the property by denying the Mayhews' planned development proposal. In *Lucas,* the Supreme Court clarified that a taking occurs "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." *Lucas,* 505 U.S. at 1019, 112 S.Ct. at 2895 (emphasis in original). Because the trial court found that Lucas's property was rendered completely and wholly valueless by the regulations at issue, the Supreme Court concluded that a taking had occurred. *Id.* at 1019-20, 112 S.Ct. at 2895-96. In contrast, the district court in this case determined that, even after the denial of the Mayhews' planned development proposal, the property retained a value of $2.4 million. In such a situation, the governmental regulation has not entirely destroyed the property's value.

Even if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations. *See Lucas,* 505 U.S. at 1019 n. 8, 112 S.Ct. at 2895 n. 8 (takings are to be measured by the "economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations"); *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659 (same); *see also Taub,* 882 S.W.2d at 826 (sufficiently severe economic impact can constitute a taking). The reasonable investment-backed expectation of the claimant is critical to this analysis because it distinguishes this concept from those situations in which the landowner's property has been totally destroyed. Because we conclude that the Mayhews had no reasonable

investment-backed expectation to build 3,600 units on their property, we hold that the Town has not unreasonably interfered with their right to use and enjoy their property by denying their planned development proposal.

When the Mayhews first began purchasing their property, the Town did not have a zoning ordinance in place. It is undisputed that the Mayhews originally purchased their property for ranching, not for development. They then used their property for ranching for nearly four decades. Historical uses of the property are critically important when determining the reasonable investment-backed expectation of the landowner. *See Esposito,* 939 F.2d at 170 ("the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel.'") (quoting *Penn Central,* 438 U.S. at 136, 98 S.Ct. at 2665). After four decades of ranching their property in a Town with a population of no more than 2,000 people, the Mayhews did not have a reasonable investment-backed expectation that they could pursue an intensive development of 3,600 units that would more than quadruple the Town's population.

The Mayhews' subsequent purchases of property in 1985 and 1986 were for purposes of development. However, at this time, the Town's zoning ordinances had restricted development to one unit per acre for the preceding twelve years. The existing zoning of the property at the time it
938 was *938 acquired is to be considered in determining whether the regulation interferes with investment-backed expectations. *See Pompa Construction Corp.,* 706 F.2d at 424-25. We do not believe that the Mayhews had a reasonable investment-backed expectation to build 3,600 units on their 1,200 acres when the Town's zoning ordinances had for twelve years limited development to one unit per acre.

Accordingly, we render judgment against the Mayhews on their regulatory takings claims. The Town's denial of the planned development substantially advanced legitimate state interests and did not totally destroy the value of the Mayhews' property or unreasonably interfere with their rights to use and enjoy their property.

B. SUBSTANTIVE DUE PROCESS

A court should not set aside a zoning determination for a substantive due process violation unless the action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Nectow v. City of Cambridge,* 277 U.S. 183, 187-88, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928); *see also Pennell v. City of San Jose,* 485 U.S. 1, 11, 108 S.Ct. 849, 857, 99 L.Ed.2d 1 (1988); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield,* 907 F.2d 239, 243-44 (1st Cir. 1990); *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1577 (11th Cir. 1989).

A generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose. *FM Properties Operating Co. v. City of Austin,* 93 F.3d 167, 174 (5th Cir. 1996); *Christensen v. Yolo County Bd. of Supervisors,* 995 F.2d 161, 165 (9th Cir. 1993); *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied,* 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991); *Smithfield Concerned Citizens,* 907 F.2d at 243-44; *Stansberry v. Holmes,* 613 F.2d 1285, 1289 (5th Cir.), *cert. denied,* 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 112 (1980). This deferential inquiry does not focus on the ultimate effectiveness of the ordinance, but on whether the enacting body could have rationally believed at the time of enactment

that the ordinance would promote its objective. *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 487-88, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). If it is at least fairly debatable that the decision was rationally related to legitimate government interests, the decision must be upheld. *See Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464, 101 S.Ct. 715, 723-24, 66 L.Ed.2d 659 (1981); *FM Properties,* 93 F.3d at 175. The ordinance will violate substantive due process only if it is *clearly* arbitrary and unreasonable. *See Esposito v. South Carolina Coastal Council,* 939 F.2d 165, 170 (4th Cir. 1991), *cert. denied,* 505 U.S. 1219, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992).

In *Greenbriar,* 881 F.2d at 1577-80, the Eleventh Circuit was faced with a substantive due process challenge similar to the challenge made by the Mayhews in this case. The fact finder determined in that case, based on conflicting evidence on whether the proposal was in the best interest of the community, that the city council had acted arbitrarily and capriciously in refusing to rezone the subject property based on "political pressure" from constituents. The Eleventh Circuit held, however, that this evidence was not sufficient to establish that the city acted irrationally or arbitrarily in rejecting the application. *Id.* at 1580; *see also Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810, 827-29 (4th Cir. 1995)(a landowner who speculatively purchases property based on the possibility of an upzoning does not demonstrate a substantive due process violation when the county refuses to grant upzoning).

We likewise conclude that the Town did not act irrationally or arbitrarily in denying the Mayhews' planned development application. The Town's concerns regarding the urbanization effects of the development are legitimate governmental
939 interests, and *939 the denial of the development application is clearly rationally related to those interests.

C. EQUAL PROTECTION

An as-applied equal protection claim requires that the government treat the claimant different from other similarly-situated landowners without any reasonable basis. *Executive 100, Inc. v. Martin County,* 922 F.2d 1536, 1541 (11th Cir.), *cert. denied,* 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991). The ordinance generally must only be rationally related to a legitimate state interest to survive an equal protection challenge, unless the ordinance discriminates against a suspect class. *Christensen v. Yolo County Bd. of Supervisors,* 995 F.2d 161, 165 (9th Cir. 1993); *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied,* 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991). Economic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny under the equal protection clause. *See City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 440, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985); *Clajon Production Corp. v. Petera,* 70 F.3d 1566, 1580 (10th Cir. 1995); *see also City of New Orleans v. Dukes,* 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976) *; Barshop v. Medina Cty. Underground Water Conservation Dist.,* 925 S.W.2d 618, 631-32 (Tex. 1996).

The Mayhews claim that they are not being treated the same as other property owners in the Town that have higher density properties. However, they are not similarly situated. A landowner seeking a zoning change for a 1200 acre development is not similarly situated to a landowner seeking to build on a small parcel of land. There is no showing that the Mayhews have been treated differently from other property owners seeking a planned development on their property.

The Mayhews also allege that the zoning ordinance has a disproportionate impact on racial minorities, thus invoking a suspect class. At trial, however, the Mayhews stipulated that they abandoned any "allegation of racial animus as a motivation for the actions either in regard to the

planned development or in regard to the existing zoning which applies to the subject property." That stipulation applies in this Court as well.

Finally, the Mayhews claim that the Town's zoning ordinance was not rationally related to a legitimate government purpose. In analyzing this claim, we apply the same standards as to their substantive due process analysis. For the same reasons that we concluded that the Town's actions did not violate substantive due process, we conclude that the Town has not violated the Mayhews' equal protection rights.

D. PROCEDURAL DUE PROCESS

If an individual is deprived of a property right, the government must afford an appropriate and meaningful opportunity to be heard to comport with procedural due process. *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L.Ed.2d 265 (1982). Accordingly, a plaintiff alleging a procedural due process takings claim must establish that he was deprived of notice and an opportunity to be heard with respect to a decision affecting his property rights. *Cf. Anderson v. Douglas County,* 4 F.3d 574, 578 (8th Cir. 1993), *cert. denied,* 510 U.S. 1113, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994); *Herrington v. County of Sonoma,* 834 F.2d 1488, 1501 (9th Cir.), *modified on other grounds,* 857 F.2d 567 (9th Cir. 1988), *cert. denied,* 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).

The Mayhews were given notice and an opportunity to be heard with respect to their development application. While the Mayhews complain that the procedure was unfair because the Town applied ad hoc unreviewable standards in making its determination and that the Town lacked the discretion to deny the application because it satisfied the applicable standards, this is not the proper inquiry. Zoning is a legislative act. *See, e.g., Thompson v. City of Palestine,* 510 S.W.2d 579, 581 (Tex. 1974). In making a legislative zoning determination, a city or town is
940 entitled to consider all the facts and *940 circumstances which may affect the property, the community, and the welfare of its citizens. *Cf. City of El Paso v. Donohue,* 163 Tex. 160, 352 S.W.2d 713, 716 (1962). To satisfy the requirements of procedural due process, then, the Town must only provide notice and an opportunity to be heard, which it did. We conclude that the Mayhews are not entitled to prevail on their procedural due process claims.

* * * *

We reverse the court of appeals' judgment dismissing the Mayhews' claims on ripeness grounds. Rather than dismissing their claims, we render a take-nothing judgment against the Mayhews because we hold that, as a matter of law, the Mayhews did not prevail on their just compensation takings claims, "substantially advances" takings claims, substantive due process and due course claims, equal protection claims, and procedural due process and due course claims under the federal and state constitutions.

No. 05-04-00704-CV
Court of Appeals of Texas, Fifth District, Dallas

Nauslar v. Coors Brewing

170 S.W.3d 242 (Tex. App. 2005)
Decided Aug 19, 2005

No. 05-04-00704-CV.

August 19, 2005.

Appeal from the 193rd District Court, Dallas
243 County, David Evans, J. *243

Martin J. Siegel, Houston, TX, for Appellant.

Jon P. Christiansen, Michael J. Aprahamian, Foley Lardner LLP, Milwaukee, WI, Monica Wiseman Latin, J. Michael Hughes, Rodney H. Lawson and John Franklin Guild, Carrington, Coleman, Sloman Blumenthal, L.L.P., David Bryant, Diamond, McCarthy, Taylor, Finley, Bryant Lee, Sean Joseph McCaffity, Dallas, TX, for Appellee.

Before Justices BRIDGES, O'NEILL, and MAZZANT.

246 *246

OPINION

Opinion by Justice O'NEILL.

The trial court granted the Defendants' pleas to the
247 jurisdiction for lack of standing *247 on all of the Plaintiffs' claims and dismissed the case. We conclude that (1) Plaintiff-Appellants lack standing on the statutory and common-law causes of action brought on their own behalf. Concerning the causes of action asserted "on behalf of" the business entity that they sold, they affirmatively negate having capacity to bring those claims. Accordingly, we affirm the trial court's dismissal of all of Plaintiffs' claims. We reverse the trial court's order denying Coors attorneys' fees and remand that issue.

Facts

The crux of this dispute is the disapproval by Coors Brewing Co. ("Coors") of a proposed consolidation in 2001 between Willow Distributors, L.P. ("Willow"), an entity distributing Coors beer in the Dallas area, and the distributor of Miller beer, Miller of Dallas ("Miller"). Plaintiffs alleged that Willow and Miller had agreed to a joint venture that would be operated by a new entity, United LP. Willow and Miller would each own 50% of the new entity, and the cash flow from the new business would be shared equally. In addition, Nauslar asserts the new enterprise would employ him as a company manager.

At the time of the proposed consolidation (the "Consolidation"), neither of the Plaintiffs was party to the distributorship agreement with Coors. Rather, Willow was the contracting party and the named distributor under the distributor agreement with Coors. Plaintiff Dennis Nauslar, individually, did not have a direct ownership interest in Willow, and Plaintiff Nauslar Investments was the limited partner in Willow. The structure underpinning Willow is as follows: Willow's general partner was DEN L.P. and its limited partner was Nauslar Investments LLC. Nauslar, individually, was 100% owner of Nauslar Investments, which in turn was the limited partner in DEN L.P (general partner in Willow).

When, in September 2001, Nauslar presented the proposed Consolidation to Coors for its approval, Coors rejected the deal. Instead, Coors invoked its right under the distributorship agreement to negotiate exclusively to buy Willow. It assigned that exclusive right to Golden Distributing Enterprises, L.P. (Golden). Over the next year, according to Plaintiffs, it became clear that Golden could not feasibly consolidate with or purchase Willow. Subsequently, Nauslar approached Miller again, but this time Miller was interested in only an outright purchase of Willow. Coors approved an outright sale to Miller. Coors, relying on a clause in the distributorship agreement, required Nauslar to sign a "mutual release" on behalf of Willow. Under that agreement, both Willow and Coors released any and all claims each had against the other and also warranted that neither party had assigned any such claims to a third party. Nauslar signed the release, and Miller bought Willow and DEN L.P. from Nauslar and Nausar Investments for $57.8 million.

Nauslar and Nauslar Investments sued Coors, alleging it unreasonably disapproved the proposed Consolidation with Miller, in violation of the Texas Beer Industry Fair Dealing Law. They also brought a number of common-law claims against Coors and Golden, including one for tortious interference with the Consolidation. After two hearings, the trial court granted Coors's and Golden's pleas to the jurisdiction and dismissed all of the Plaintiffs' causes of action for lack of standing. Plaintiffs brought this appeal, challenging the trial courts' dismissal of their
248 statutory and common-law causes of action. *248

Summary

Plaintiffs seek to bring their claims in their own right, as individual claims brought on their own behalf. They also assert — as former partners and owners of Willow — claims "on behalf of" Willow, for alleged injuries to Willow itself, but with recovery going to Plaintiffs, not Willow. First, we address the individual claims and conclude that Plaintiffs lack standing to bring either the common-law or statutory causes of action in their own right. We address next the claims brought "on behalf of" Willow, i.e., the Willow partnership's claims. We conclude that Plaintiffs, in their live pleading, affirmatively negate that they have capacity to bring claims on behalf of Willow. Having rejected their other theory by which to allege capacity, we affirm dismissal of the claims asserted on behalf of Willow. We conclude that an award of attorney's fees under the statute is mandatory if one party prevails in an action under that statute, and thus we reverse the trial court's order denying Coors its attorney's fees and remand that issue.

I. Common-Law Causes of Action Asserted as Individual Right of Action

We address whether the Plaintiffs have standing, in their own right, to bring and personally recover on the common-law causes of action[1] they assert against Defendants. We note first the injury asserted. Plaintiffs allege that Willow was weakened by Coors's efforts to force a deal with Golden, and that Willow's value declined between the time of the disapproval in 2001 and the subsequent sale to Miller in 2003. Specifically, Plaintiffs assert damages as follows: Nauslar, individually, seeks redress for (1) the distributions, profits and other benefits of ownership he would have reaped as the *sole owner* of Willow and other corporate entities, had Coors approved the Consolidation; and (2) loss of salary, bonuses and other employment compensation he would have been paid by United (the operating entity to be formed upon Consolidation) as well as employment-related losses as an *employee* of Willow. Nauslar Investments, Inc. asserts that, as the *former general partner* of DEN LP (the general partner of Willow) and as the *former limited partner* of Willow, it was "injured to the same degree as — and could assert all claims of DEN LP and Willow."

1 Plaintiffs sued Coors for breach of contract and sued both Coors and Golden for conspiracy to terminate the Consolidation, negligence per se, and tortious interference. Nauslar also asserted that he, individually, was a third-party beneficiary to the Consolidation agreement. We refer to these causes of action collectively as Plaintiffs' common-law actions.

In sum, Nauslar seeks damages for loss of the benefits of ownership and employment-related losses. Nauslar Investments, as former general partner of the general partner of Willow, seeks damages that mirror those suffered by Willow.

A. Standard of Review and Principles Governing Standing

Because the question of standing is a legal question, we review de novo a trial court's ruling on a plea to the jurisdiction. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). Standing is a component of a court's subject-matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). The plaintiff has the burden of alleging facts that affirmatively demonstrate a court's jurisdiction to hear a cause. *Id.* A plea to the jurisdiction challenges a trial court's authority to hear a case
249 by alleging that the factual allegations *249 in the plaintiff's pleadings, when taken as true, fail to invoke the trial court's jurisdiction. *El Paso Cmty. Partners v. B G/Sunrise Joint Venture*, 24 S.W.3d 620, 623 (Tex.App.-Austin 2000, no pet.) (citing *Bybee v. Fireman's Fund Ins. Co.*, 160 Tex. 429, 331 S.W.2d 910, 917 (1960)). We construe the allegations in the pleadings in favor of the pleader. *Tex. Air Control Bd.*, 852 S.W.2d at 446.

When a plaintiff fails to plead facts that establish jurisdiction, but the petition does not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). On the other hand, if the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.*

A person has standing to sue when he is personally aggrieved by the alleged wrong. *Nootsie Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). A person has standing if (1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; (2) he has a direct relationship between the alleged injury and claim sought to be adjudicated; (3) he has a personal stake in the controversy; (4) the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or other-wise; or (5) he is an appropriate party to assert the public's interest in the matter, as well as his own. *Precision Sheet Metal Mfg. Co., Inc. v. Yates*, 794 S.W.2d 545, 552 (Tex.App.-Dallas 1990, writ denied).

Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate. *Exxon Corp. v. Pluff*, 94 S.W.3d 22, 27 (Tex.App.-Tyler 2002, pet. denied); *Cadle Co. v. Lobingier*, 50 S.W.3d 662, 669-70 (Tex.App.-Fort Worth 2001, pet. denied); *Brunson v. Woolsey*, 63 S.W.3d 583, 587 (Tex.App.-Fort Worth 2001, no pet.). Only the person whose primary legal right has been breached may seek redress for an injury. *Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976) (defrauded party only can bring suit to set aside deed obtained by fraud). "Without breach of a legal right belonging to the plaintiff no cause of action can accrue to his benefit." *Id.*

B. Legal Principles: Whose Primary Legal Right Was Allegedly Infringed?

Plaintiffs' principle argument is that the issue raised concerns who owns the claims, and thus presents a question of capacity, not standing. They rely on *Pledger v. Schoellkopf*, 762 S.W.2d 145, 146 (Tex. 1988) (a challenge to a shareholder's right to bring a cause of action for wrongs done to

the corporation raises a question of capacity). They also rely on *Prostok v. Browning*, 112 S.W.3d 876, 921 (Tex.App.-Dallas 2003) ("A challenge to who owns a claim raises the issue of capacity, not standing."), *aff'd*, 165 S.W.3d 336 (Tex. 2005). We disagree that the pleadings raise only an issue of capacity, not standing. The case law reveals that, with respect to Plaintiffs' individual common-law causes of action, a fundamental question is raised: Do these claims embody a primary legal right belonging to the Plaintiffs or does the Willow partnership have the primary right of action? That raises an issue of standing.

We note initially that *Pledger* cannot stand for the simplistic proposition that a challenge to a stakeholder's bringing a suit to recover personally
250 for corporate wrongs *250 raises an issue of capacity only. The *Pledger* court did not, indeed could not, discuss standing because that issue was not before it. 762 S.W.2d at 145-46. The case was decided before the determination that standing is an component of subject-matter jurisdiction and thus can be raised first on appeal. *See Tex. Air Control Bd.*, 852 S.W.2d at 446.

An individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity. *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990). In *Wingate*, one corporate shareholder sued another alleging he had appropriated corporate assets. The court ruled that individual stockholders have no separate, independent right of action for injuries suffered by the corporation, when the injures merely result in depreciation of the value of plaintiffs' stock. *Id.* at 719.

In *Fredericksburg Indus., Inc. v. Franklin Int'l, Inc.*, 911 S.W.2d 518, 520 (Tex.App.-San Antonio 1995, writ denied), the president/employee of a furniture manufacturing corporation sued a corporate supplier, asserting he lost wages as a result of the supplier's delivering defective glue. The court held he lacked standing: the cause of action belonged to the corporation alone, as the damages were to the corporation's profits, and any claim the plaintiff had for lost wages was against the corporation. *Id.* at 521.

Other cases in the corporate context reaffirm that where damage is to the business entity's worth, the individual stakeholder cannot personally recover, whether the damages sought are in terms of diminished value of an ownership interest or loss of employee benefits. In *Mendenhall v. Fleming Co., Inc.*, 504 F.2d 879 (5th Cir. 1974), the plaintiffs sought to recover personally for damages from anti-trust violations arising from the operation of retail stores by a corporation, which they had created. *Id.* at 880. The court noted that the business allegedly interfered with was that operated by the corporation and the damages sought were direct damage to corporate worth. Thus, the plaintiffs lacked standing. *Id.* at 880-81. The right of recovery was the entity's right alone, even though in an economic sense the impact "may bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership." *Id.* at 881 (quoting *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957)).

A partner has no individual, separate cause of action for losses suffered by reason of tortious interference with a contract between the partnership and a third party: damages for loss in value of the partnership interest or employment losses are subsumed in the partnership's causes of action. *Cates v. Int'l Tel. Tel. Corp.*, 756 F.2d 1161 (5th Cir. 1985) (construing Texas law).

C. Application and Conclusion

Nauslar generally argues that he has standing, because he was "personally aggrieved" by, and suffered "direct injury" from, Defendants' actions in disapproving the Consolidation. He seeks to recover for loss of benefits of ownership and employment. Nauslar Investments asserts it has

standing to sue, individually, for harms done to the partnership and seeks damages mirroring those Willow could recover.

As the case law demonstrates, Plaintiffs do not have a separate, individual right of action for injuries to the partnership that diminished the value of their ownership interest in that entity. *Wingate*, 795 S.W.2d at 719. Willow is the one who suffered the direct injury from the alleged
251 *251 harm to the partnership's worth, and any loss to Plaintiffs in the sale price is "both indirect to and duplicative of" the entity's right of action. *Mendenhall*, 504 F.2d at 881. The right of recovery is Willow's right alone, even though the economic impact of the alleged wrongdoing may bring about reduced earnings, salary or bonus. *Fredericksburg*, 911 S.W.2d at 520; *Cates*, 756 F.2d at 1181; *Mendenhall*, 504 F.2d at 881.

We note the applicability of the facts in *Cates* to the instant case. 756 F.2d 1161. The *Cates* plaintiff, a minority partner, attempted to bring individual claims for tortious interference with the partnership's business, as do the Plaintiffs here. The damages sought were similar as well. The court's holding warrants quotation:

> Accordingly, any claims for damages which [plaintiff] suffered by reason of diminution in value of his partnership interest, or his share of partnership income, or his salary or bonus from the partnerships or their businesses, by reason of breach of such agreements, or tortious interference with such businesses, or anticompetitive conduct interfering with or limiting or "taking over" such businesses or their activities, *are in effect subsumed within the causes of action of the partnerships and do not afford [plaintiff] . . . a separate, individual cause of action.*

Id. at 1181.

Accordingly, Willow possesses the primary legal right that was allegedly violated, and thus Willow is the exclusive party with a justifiable interest in redressing those alleged injuries. Accordingly, Plaintiffs do not have a standing to pursue and recover personally on the asserted common-law causes of action.

Plaintiffs' arguments to the contrary do not alter our conclusion. Concerning the tortious-interference cause of action, Nauslar argues that he has individual standing to pursue the claim under *Sturges v. Wal-Mart Stores, Inc.*, 39 S.W.3d 608 (Tex.App.-Beaumont 1998), *rev'd on other grounds*, 52 S.W.3d 711 (Tex. 2001). In that case, individuals were deemed to have standing where a proposed business entity was never formed due to the defendant's interference. The appellate court held that the individual plaintiffs, who had signed the letter of intent, were all "interested parties who would have profited from the prospective lease," who were directly involved in the building of the proposed structure, and who sustained "direct economic injury" as a result of Wal-Mart's interference. *Id.* at 614-15.

Sturges is inapposite. The proposed entity in *Sturges* was never formed, leaving the principals in that enterprise as the directly injured parties. In today's case, the direct injury from Defendants' alleged wrongdoing was to Willow, the operating business entity that would have consolidated with Miller.

Plaintiffs also rely on *Abraham Inv. Co. v. Payne Ranch, Inc.*, 968 S.W.2d 518 (Tex.App.-Amarillo 1998, pet. denied) to overcome the obstacle that they were not party to the proposed consolidation agreement between Willow and Miller. In that case, plaintiff Abraham had a contract to purchase a ranch from defendant Payne. That contract was subject to a pre-existing preferential right of purchase contained in a contract between Payne and Campbell, which Campbell exercised to purchase the ranch. Defendants asserted Abraham lacked standing to sue for tortious interference, as

he was not party to the Payne-Campbell contract. The court disagreed: whether Abraham was entitled to fulfillment of the direct contract to purchase with Payne turned on whether the third-party contract was properly exercised. *Id.* at 523-
252 34. *252 *Abraham* is inapposite, as the analogy fails at the outset. The plaintiff had a direct contract with the defendant. Disposition under that contract turned on whether the third-party contract was properly exercised. In today's case, there is no direct contract between Plaintiffs and Defendants Coors and Golden. Accordingly, Plaintiffs lack standing to pursue their tortious-interference cause of action against Defendants.

Nauslar Investments asserts standing in its roles as *former* general partner of Willow's general partner and *former* limited partner of Willow. To overcome the obstacle that it is not a general partner of Willow, it relies on the double derivative rule governing corporate derivative suits. To overcome the general rule that a partner cannot sue individually on a partnership claim, it relies on cases applying an exception to that rule. Those cases do not apply because, as discussed below, Nauslar Investments sold to Miller the entirety of its interest in Willow.[2] None of the cases it cites stands for the proposition that a partner that has sold its entire interest in the partnership can personally recover on a claim belonging to that partnership. The *Mendenhall* court, discussing the sale of corporate stock, captured the effect of the Plaintiffs' sale of the partnership:

> [2] The facts in the cited cases are not analogous: *Allied Chemical Co. v. DeHaven*, 824 S.W.2d 257 (Tex. App-Houston [14th Dist.] 1992,) (exceptional circumstances made it inequitable to prevent resigning partner from bringing suit on behalf of partnership during winding-up phase); *Tex. Westheimer Corp. v. 5647 Westheimer*, 68 S.W.3d 15, 21-22 (Tex.App.-Houston [1st Dist.] 2001, pet. denied) (dispute over rights to profit participation owed to partnership by third party; suit instituted during winding-up phase of partnership) In today's case, the partnership was not wound up, but as discussed below, Plaintiffs sold the partnership in its entirety.

> When [plaintiffs] sold their corporate stock to a third party, *they sold their right to control the very cause of action they now attempt to assert.* This suit cannot reclaim that corporate cause of action by asserting the same damage sustained by the corporation also served to diminish the value of their individually held estates.

Mendenhall, 504 F.2d at 881.

II. Plaintiffs' Statutory Causes of Action Asserted in Their Right

Plaintiffs assert that Coors unreasonably disapproved the Consolidation in violation of the Texas Beer Industry Fair Dealing Law (BIFDL), which prohibits manufacturers from withholding approval of the transfer of distributorship rights if the substituting party meets "reasonable standards." TEX. ALCO. BEV. CODE ANN. § 102.71, -.76, -.77, -.79 (Vernon 1995). We examine whether Plaintiffs have standing, in their own right, to bring a claim for the alleged violation of BIFDL.[3]

> [3] It is undisputed that Willow itself has standing to pursue a BIFDL claim. Willow is not a party to this suit and Plaintiffs disavow that they are suing derivatively on any claims that belong to Willow.

A. Legal Principles Governing Standing Based on Statute

Standing to sue can be predicated upon either statutory or common-law authority. *See Williams v. Lara*, 52 S.W.3d 171, 178-79 (Tex. 2001). The general rules of standing apply unless statutory authority for standing exists. *Id.* at 178. If standing is statutorily conferred, the statute granting

authority and the case law interpreting it serve as the proper framework of analysis. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984).

We review matters of statutory construction de
253 novo. *City of San Antonio* *253 *v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). In construing a statute, our objective is to determine and give effect to the legislature's intent. *Id.* If a statute's meaning is unambiguous, we generally interpret the statute according to its plain meaning. *Id.* We begin by examining the exact wording and apply the tenet that the legislature chooses its words carefully and means what it says. *Williams v. Vought*, 68 S.W.3d 102, 115 (Tex.App.-Dallas 2001, no pet.) (Morris, J., concurring). We determine legislative intent from the entire act and not just its isolated portions. *City of San Antonio*, 111 S.W.3d at 25.

BIFDL provides a judicial remedy for a "manufacturer" or "distributor," as defined in the statute,[4] who are parties to a distributorship agreement:

> If a manufacturer or distributor who is a party to an agreement pursuant to Section 102.51 of this code fails to comply with this Act or otherwise engages in conduct prohibited under this Act . . . the aggrieved manufacturer or distributor may maintain a civil action in a court of competent jurisdiction. . . .

TEX. ALCO. BEV. CODE ANN. § 102.79(a).

[4] Under section 102.71, "distributor" is defined as a person licensed under Section 64.01 or 65.01 of the Act, which sections in turn define the activities a licensed distributor is authorized to perform. TEX. ALCO. BEV. CODE ANN. §§ 64.01, 65.01, 102.71.

BIFDL prohibits a manufacturer from withholding approval of a distributor's transfer of its distributorship interest when the person or persons to be substituted "meet reasonable standards." The full provision reads as follows:

> *No manufacturer shall unreasonably withhold or delay its approval of any assignment, sale, or transfer of the stock of a distributor* or all or any portion of a distributor's assets, distributor's voting stock, the voting stock of any parent corporation, or the beneficial ownership or control of any other entity owning or controlling the distributor, including the distributor's rights and obligations under the terms of an agreement *whenever the person or persons to be substituted meet reasonable standards*. . . .

Id. § 102.76(a) (emphasis added).

In a case construing these two sections of BIFDL, the Corpus Christi Court of Appeals held that the plaintiff did not have a statutory right to maintain its cause of action against the distributor, because it failed to comply strictly with the statute's requirements. *Ace Sales Co., Inc. v. Cerveceria Modelo, S.A. de C.V.*, 739 S.W.2d 442, 447 (Tex.App.-Corpus Christi 1987, writ denied). The distributor Ace sought damages for the manufacturer's failure to approve a transfer of the distributorship rights to Ace's buyer. The court noted that section 102.79 of BIFDL provides a remedy for parties to an agreement under section 102.51, which in turn requires a written agreement. TEX. ALCO. BEV. CODE ANN. §§ 102.51, 102.79. Because Ace did not produce a written agreement, it had no remedy under BIFDL. *Id.* In so holding, the court relied on the principle that "if a cause of action and remedy for its enforcement are derived from a statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable." *Id.* (quoting *Tex. Catastrophe Prop. Ins. Ass'n v. Council of Co-Owners of Saida II Towers Condo. Ass'n*, 706 S.W.2d 644, 646 (Tex. 1986)).

B. Analysis and Conclusion

Nauslar argues that although he is not a "distributor" under the BIFDL definition, he should be entitled to sue under the statute, based on its text, legislative history, and purpose. 254 Nauslar *254 points to the text of Section 102.76(a) that protects not just transfers of the distributorship itself, but also transfers of "the voting stock of any partner corporation," as well as the "beneficial ownership" of entities owning the distributor. He argues that persons representing those interests must have standing under the statute, to effectuate the broad protective purpose of the statute. He also points to pieces of legislative history to indicate that, in discussing the pending bill, the legislators did not distinguish between the business entity that comprises the distributorship and the individuals who own that entity.

We are not persuaded to adopt Plaintiffs' expansive reading of the text of BIFDL. Rather, we are persuaded by Appellee's argument that when the legislature intends to grant a remedy to all persons who might be injured by a statutory violation, it plainly grants a remedy to "injured persons." *See, e.g.*, TEX. BUS. COM. CODE ANN. § 19.02 (Vernon 2002) (granting judicial remedy to "a person injured" by a violation of the statute regulating relationship between manufacturers and dealers of particular equipment); TEX. OCC. CODE ANN. § 2352.201 (Vernon 2004) (violators of statute are liable to "an injured party . . .").

We apply the tenet that the legislature chooses its words carefully and means what it says. *Williams*, 68 S.W.3d at 115. The remedies section, Section 102.79(a), plainly states who may sue for violations of the statute: "manufacturers" and "distributors," as defined under the statute, who are party to a distributorship agreement. These plaintiffs do not fall within the statutorily defined class of persons who may sue. Neither are we persuaded to read the statute expansively to go beyond its plainly stated purpose. The statute states that its purpose is "to promote the public's interest in the fair, efficient, and competitive distribution of beer within the state. . . ." TEX. ALCO. BEV. CODE ANN. § 102.72. As noted, Willow itself has standing to redress violations of the statute. This satisfies the statutory purpose of protecting the *general public interest* in fair competition. We conclude the statutory purpose does not extend to protect Plaintiffs' individual interests in obtaining higher compensation from the transfer of its interest in Willow. *Tex. Catastrophe Prop. Ins.*, 706 S.W.2d at 646 (when cause of action derives from statute, statutory provisions must be complied with in all respects or action not maintainable).

C. Was the No-Assignment Clause Void?

Nauslar asserts Coors demanded that Willow sign a mutual release of any claims it had against Coors, which included Willow's warranty that it had not assigned any of its claims to a third party. Nauslar asserts that, but for Coors's insistence that he execute the release by Willow, he would have assigned Willow's claims to himself. The release, Nauslar asserts, violated the "anti-waiver" provision of BIFDL. He argues Coors should not be allowed to circumvent the section prohibiting unreasonable disapproval of a transfer by violating the section prohibiting the release of such claims. As a remedy, Nauslar invokes equity principles, urging the court to declare an "equitable assignment" of Willow's claims to Nauslar, thus enabling him to sue — as constructive assignee of Willow's claims — under BIFDL.

Section 102.72(c) of BIFDL states, "The effect of this Act may not be varied by agreement. Any agreement purporting to do so is void and unenforceable to the extent of such variance only." Nauslar asserts that this "anti-waiver" provision prohibited Coors from conditioning its approval of 255 the sale of Willow on Willow's *255 release of its claims against Coors. Nauslar insists the only permitted reason for disapproving a transfer under section 102.76 is when the proposed transferee

fails to meet "reasonable standards." Coors is thus not permitted to disapprove a transfer based on a failure to sign a release. Thus Nauslar argues, the release-with-non-assignment clause, which waives the distributor's BIFDL claim, should be declared void under the anti-waiver provision, section 102.72(c).

We note that the issue Nauslar raises, whether he individually had statutory standing to pursue Willow's claim, turns on the permissibility of the clause in which Willow warrants it did not assign its claims to a third party. Thus, we need not address whether the release by Willow of its own BIFDL claims against Coors was prohibited by the anti-waiver provision in section 102.76(c). The issue is this: Is a distributor's representation that it has not assigned its statutory claims, if any, to a third party an agreement that "varies the effect of the BIFDL" so as to be void? As discussed, the plain language of section 102.79 grants a right of action only to "distributors or manufacturers" that are party to a distributorship agreement. Nauslar points to no authority to indicate that BIFDL claims must remain freely assignable to those not otherwise entitled to bring such claims in their own right. And we see no language in the text of the statute requiring the reading urged by Plaintiffs.

Accordingly, we hold that neither Plaintiff has standing to bring the claims, on their own behalf, seeking redress for violations of BIFDL.

III. Plaintiffs' Causes of Action Asserted "On Behalf Of" Willow

We turn to Plaintiffs' assertion of causes of action purportedly brought "on behalf of" Willow. Plaintiffs assert — as the *former partners in and owners of* Willow — they are entitled to recover personally on Willow's claims for injuries suffered by Willow. Plaintiffs argue Defendants' challenges go to the issue of "claim ownership" only. They assert, "An argument about whether a current or former owner, as distinct from his company, owns a particular claim is an argument about capacity."

A. Legal Principles

A plaintiff must have both standing and capacity to bring a lawsuit. *Coastal Liquids Transp. L.P. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001). A party has capacity to sue when it has legal authority to act, regardless of whether it has a justiciable interest in the controversy. *Nootsie, Ltd.*, 925 S.W.2d at 661. Standing pertains to a person's justiciable interest in a suit and is a component of subject-matter jurisdiction. *See Tex. Air Control Bd.*, 852 S.W.2d at 443, 445-46. Capacity is a party's legal authority to go into court to prosecute or defend a suit. *El T. Mexican Rests., Inc. v. Bacon*, 921 S.W.2d 247, 249 (Tex.App.-Houston [1st Dist.] 1995, writ denied).

B. Analysis and Conclusion

Plaintiffs allege, and it is undisputed, that Plaintiffs sold their interest in the Willow partnership to Miller. Willow's causes of action belong to the partnership, not to its partners. Absent an agreement otherwise, Willow's assets, including any chose in action it held, would have
256 transferred to Miller in the sale.[5] *256

[5] Under the Texas Revised Limited Partnership Act (TRLPA), the partnership, not the partners, own the partnership's property. TEX.REV.CIV. STAT. ANN. art. 6132a-7.01 (Vernon Supp. 2004-05). When a business entity is acquired in its entirety by another, in the absence of specific terms to the contrary, both the liabilities and assets of the acquired company are transferred to the purchaser. *Duke Energy Field Servs. Assets, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 68 S.W.3d 848, 850 (Tex.App.-Texarkana 2002, pet. denied).

Plaintiffs do not allege that they consensually acquired legal title to Willow's causes of action — and thus possess exclusive authority (capacity) to prosecute and recover on Willow's claims. That is, they do not allege that, despite the sale to Miller, they retained title to Willow's causes of action, or

otherwise acquired those assets by assignment. Indeed, Plaintiffs allege and argue the opposite: they allege that Coors conditioned its approval of the sale on Willow's warranting it had not assigned its claims against Coors to a third party. Nauslar argues, but for that condition, he would have caused Willow to assign its claims to himself.[6]

> 6 Plaintiffs plead, in their live pleading:
>
> > [A]s a condition for gaining its approval, and in tacit acknowledgement of its past wrongdoing, Coors extracted a purported release from Willow for claims against Coors arising out of its former, illegal conduct.
>
> . . .
>
> > Coors' release also contained the following provision requiring Nauslar to represent that he had not assigned Willow's claim to any third party . . .
>
> > If Coors had not conditioned approval of Nauslar's sale of Willow and DEN to Miller of Dallas on execution of its release in its original form, and had instead agreed to allow assignments, Nauslar would have assigned to himself all rights possessed by Willow to sue Coors for the claims alleged in this petition.

Plaintiffs thus judicially admit they have do not own legal title to Willow's causes of action. *Houston First American Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983) (judicial admissions are assertions of fact, not pled in the alternative, in the live pleadings of a party). Plaintiffs do posit the "constructive assignee" theory by which to establish their alleged right to bring Willow's causes of action. As a legal basis, they argue the warranty of no assignment violates BIFDL and thus should be declared void. We concluded above, as a matter of law, that the non-assignment clause does not violate BIFDL. Plaintiffs allege no other legal basis to avoid the effect of their having failed to acquire the legal right to prosecute and personally recover on Willow's causes of action.

To bring suit and recover on a cause of action, a plaintiff must have both standing and capacity. *El T. Mexican Rests.*, 921 S.W.2d at 250. It is recognized that a party may plead himself out of court, e.g., the plaintiff may plead facts which affirmatively negate his cause of action. *Tex. Dept. of Corrections v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974) (citing *Schroeder v. Tex. Pacific Ry. Co.*, 243 S.W.2d 261 (Tex.Civ.App.-Dallas 1951, no writ)). Plaintiffs affirmatively negate that they own legal title to Willow's claims, asserting instead a legal theory to overcome that fact, which we have rejected.[7] We conclude that, on the state of the pleadings, Plaintiffs lack capacity to bring Willow's partnership claims. Thus, the suit cannot proceed on those causes of action. We decline to remand for the trial court to engage in a futile
257 inquiry. *Wilson* *257 *v. Texas Parks and Wildlife Dept.*, 8 S.W.3d 634, 635 (Tex. 1999) (declining to remand for retrial of issue on which no evidence was offered; such "would be improper and, it appears, futile"); *Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (declining to remand when futile and not in furtherance of judicial economy). We conclude the claims asserted "on behalf of" Willow were properly dismissed. Accordingly, we need not reach the issue whether Plaintiffs also lacked standing to pursue Willow's claims. In addition, we need not reach other unrelated issues raised by Plaintiff.

> 7 In addition, at the end of the first hearing, the trial court ordered Plaintiffs to replead with much more specificity so that you make it clear "who is suing for what, what wrong to whom, when, and causing whatever for what period of damages. . . .

> I'm probably going to grant [the pleas to jurisdiction] the next go round if you don't make it clear. . . ." *See Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004) (if plaintiff given opportunity to amend and still fails to allege facts sufficient to withstand plea to jurisdiction, court should dismiss action).

IV. Attorney Fees under BIFDL

Coors asserts, on cross-appeal, that the trial court erred in denying Coors attorney fees under BIFDL. Coors argues it prevailed on the BIFDL claims and an award of attorney's fees is mandatory to the prevailing party in an action brought under BIFDL.

Section 102.79(c) of BIFDL states,

> The *prevailing party to any action* under Subsection (a) of this section shall be entitled to actual damages, including the value of the distributor's business, as specified in Section 102.77 of this code, *reasonable attorney's fees*, and court costs.

TEX. ALCO. BEV. CODE ANN. § 102.79(c) (emphasis added). Subsection (a) provides for a right of action for a "manufacturer or distributor" who is party to a distributorship agreement. If the defending manufacturer or distributor fails to comply with the statute, "the aggrieved manufacturer or distributor *may maintain* a civil action in a court of competent jurisdiction. . . ." *Id.* § 102.79(a) (emphasis added).

Plaintiff's respond that, if they do not have standing under the statute, then the trial court lacks jurisdiction to award attorney's fees, relying on *Smith v. Tex. Improvement Co.*, 570 S.W.2d 90, 92 n. 3 (Tex.App.-Dallas 1978, no writ) (when court lacks jurisdiction, court cannot render judgment j.n.o.v.; only valid order is one of dismissal).

We have concluded that Plaintiffs lack standing to bring the BIFDL claims, either in their own right or "on behalf of" Willow. Coors thus qualifies as a "prevailing party" within the meaning of section 102.79(c). *Robbins v. Capozzi*, 100 S.W.3d 18, 27 (Tex.App.-Tyler 2002, no pet.) ("prevailing party" successfully prosecutes or defends against an action; prevailing party is one who is vindicated). The BIFDL claims were brought under subsection (a) as section 102.79(c) requires. Further the fee award is mandatory, in that subsection (c) explicitly states the prevailing party "shall" recover reasonable attorney's fees. *See Town East Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 812 (Tex.App.-Dallas 1987, no writ) (fees mandatory under statutory provision stating "consumer who prevails *shall* be awarded court costs and reasonable and necessary attorney's fees").

The Plaintiffs' reliance on the broad statements in *Smith* is misplaced. That case did not address an issue involving a statutory provision mandating an award of fees. A trial court's dismissal for lack of subject-matter jurisdiction does not prevent the concurrent award of attorney's fees under the mandatory award provision. *See Galveston County Comm'rs Court v. Lohec*, 814 S.W.2d 751, 755 (Tex.App.-Houston [(14th Dist.)] 1991), *rev'd on other grounds*, 841 S.W.2d 361 (Tex. 1992) (under declaratory-judgment statute, trial court could award attorneys' fees against party found to have no standing). Further, the statute is worded such that a manufacturer or distributor may *maintain an*
258 *action* and the prevailing party in that *258 action *shall* recover reasonable attorney fees. Thus, the statutory text mandates the award of fees even if the action cannot be *maintained*, whether or not it is dismissed for lack of jurisdiction. Accordingly, we reverse the trial court's order denying Coors attorney's fees and remand that issue for further proceedings.

Accordingly, we **AFFIRM** the trial court's dismissal of all of Plaintiffs claims. We **REVERSE** the trial court's order denying Coors attorney's fees under BIFDL and **REMAND** that issue for further proceedings.

No. 95-1041
Supreme Court of Texas

Nootsie v. Williamson County Appraisal Dist

925 S.W.2d 659 (Tex. 1996)
Decided Jul 12, 1996

No. 95-1041.

Argued April 16, 1996.

Decided July 12, 1996.

Appeal from the 26th Judicial District Court, Williamson County, Billy Ray Stubblefield, J.

660 *660

William Ikard, Sharmyn K. Lilly, George Walter McCool, Dan Morales, Christine Monzingo, Austin, for Petitioners.

Russell R. Graham, Judith A. Hargrove, Austin,

661 for Respondent. *661

SPECTOR, Justice, delivered the opinion of the Court, in which PHILLIPS, Chief Justice, and HECHT, CORNYN, ENOCH, OWEN, BAKER, and ABBOTT, Justices, join.

Following the voters' passage of a constitutional amendment calling upon the Legislature "[t]o promote the preservation of open-space land," the Legislature defined ecological laboratories as property promoting "farm and ranch purposes." The question here is whether the Legislature acted constitutionally. The trial court ruled that the ecological laboratory provision is constitutional. The court of appeals reversed. 905 S.W.2d 289, 292. We hold that the statute is constitutional and therefore reverse the judgment of the court of appeals.

I

The Texas Constitution commands that "[t]axation shall be equal and uniform" and that real property "shall be taxed in proportion to its value." TEX. CONST. art. VIII, §§ 1(a), 1(b). This Court has long interpreted "value" as "market value." *See Lively v. Missouri, K. T. Ry. Co.,* 102 Tex. 545, 120 S.W. 852, 856 (1909). In 1978, the voters added the following amendment to the Constitution:

> To promote the preservation of open-space land, the legislature shall provide by general law for taxation of open-space land devoted to farm or ranch purposes on the basis of its productive capacity and may provide by general law for taxation of open-space land devoted to timber production on the basis of its productive capacity. The legislature by general law may provide eligibility limitations under this section and may impose sanctions in furtherance of the taxation.

TEX. CONST. art. VIII, section 1-d-1(a). The Legislature then defined "open-space land" subject to productive capacity taxation as

> land currently devoted principally to agricultural use to the degree of intensity generally accepted in the area and that has been devoted principally to agricultural use or to production of timber or forest products for five of the preceding seven years *or land that is used principally as an ecological laboratory by a public or private college or university.*

TEX. TAX CODE § 23.51(1) (emphasis added).

Nootsie, Limited, owns land subject to ad valorem taxation by both the Travis County and Williamson County Appraisal Districts. As stipulated at trial, the property qualifies under section 23.51(1) because the University of Texas, Baylor University, the University of Houston, and St. Edward's University have used the land as an ecological laboratory since 1967. The Travis County Appraisal District has granted Nootsie's application for productive capacity taxation as an ecological laboratory every tax year since 1979, and the Williamson County Appraisal District granted Nootsie's application from 1979 until 1989. In 1990, however, the Williamson County Appraisal District ("district") denied Nootsie's application, claiming that the ecological laboratory provision exceeds the legislative mandate contained in article VIII, section 1-d-1(a) of the Texas Constitution. The district's appraisal review board agreed.

Nootsie then filed an appeal for judicial review. The district answered and filed a counterclaim and third-party petition naming the Attorney General of Texas as a third-party defendant. The district sought a declaratory judgment that section 23.51(1) violates the Constitution because of the inclusion of ecological laboratories as open-space land.

The trial court ruled that section 23.51(1) is constitutional. After raising the issue of the district's capacity to file its counterclaim *sua sponte,* the court of appeals held that the district could bring its challenge and that section 23.51(1) violates the Constitution. *See* 905 S.W.2d at 291-93.

II

A plaintiff has *standing* when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy. *See Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex. 1984); *Pledger v. Schoellkopf,* 762 S.W.2d 145, 146 (Tex. 1988). Nootsie argues that the district had *662 neither standing nor capacity to file its counterclaim. We disagree with Nootsie's standing argument and do not reach its capacity argument.

Although Nootsie never raised standing at trial, it may raise the issue on appeal for the first time because standing implicates the trial court's subject matter jurisdiction. *See Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 443-44 (Tex. 1993). We have noted that "[t]he general test for standing in Texas requires that there '(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.' " *Id.* at 446 (quoting *Board of Water Engineers v. City of San Antonio,* 155 Tex. 111, 283 S.W.2d 722, 724 (1955)).

Nootsie argues that as a political subdivision of the State, the district has no inherent vested rights protected by the Constitutions of Texas and the United States. *See Deacon v. City of Euless,* 405 S.W.2d 59, 62 (Tex. 1966). This argument misses the mark because the district does not contend that the statute violates constitutional rights belonging to the district. Instead, the district asserts an interest because it is charged with implementing a statute that it believes violates the Texas Constitution. This interest provides the district with a sufficient stake in this controversy to assure the presence of an actual controversy that the declaration sought will resolve. *See Nueces County Appraisal Dist. v. Corpus Christi People's Baptist Church, Inc.,* 860 S.W.2d 627, 630 (Tex.App. — Corpus Christi 1993) (holding that an appraisal district is the proper party to challenge the constitutionality of a tax statute), *rev'd on other grounds,* 904 S.W.2d 621 (Tex. 1995); *cf. Robbins v. Limestone County,* 114 Tex. 345, 268 S.W. 915, 917 (1925) (holding that county and road districts can sue the state highway commission on the ground of the invalidity of statutes).

We do not reach the merits of Nootsie's argument that the district acted without legal authority when it contested the constitutionality of the statute. After the district filed its counterclaim and third-party petition against the state, neither Nootsie nor the Attorney General raised the capacity issue. Unlike standing, an argument that an opposing party does not have the capacity to participate in a suit can be waived. Texas Rule of Civil Procedure 93(1) requires a party to file a verified pleading if it argues that "the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued." We have not hesitated in previous cases to hold that parties who do not follow rule 93's mandate waive any right to complain about the matter on appeal. *See, e.g., Roark v. Stallworth Oil Gas, Inc.,* 813 S.W.2d 492, 494 (Tex. 1991); *Pledger,* 762 S.W.2d at 146. Here, Nootsie first questioned the district's capacity in its briefing before this Court. Therefore, Nootsie has waived its complaint about capacity.

III

Nootsie argues next that section 23.51(1) does not violate the Texas Constitution and that the court of appeals erred by finding otherwise. We agree.

We presume that a statute passed by the Legislature is constitutional. *HL Farm Corp. v. Self,* 877 S.W.2d 288, 290 (Tex. 1994); *Lower Colo. River Auth. v. McCraw,* 125 Tex. 268, 83 S.W.2d 629, 632 (1935). Furthermore, this Court must liberally construe any constitutional provision that directs the Legislature to act for a particular purpose, *Texas Nat. Guard Armory Bd. v. McCraw,* 132 Tex. 613, 126 S.W.2d 627, 634 (1939) (orig. proceeding), and we must, if possible, construe statutes to avoid constitutional infirmities. *Texas State Bd. of Barber Examiners v. Beaumont Barber College, Inc.,* 454 S.W.2d 729, 732 (Tex. 1970). Finally, we must reject interpretations of a statute that defeat the purpose of the legislation so long as another reasonable interpretation exists. *Citizens Bank v. First State Bank,* 580 S.W.2d 344, 347-48 (Tex. 1979).

The district presents a facial challenge to section 23.51(1). It does not argue that the statute operates unconstitutionally only in this case; instead, it argues that section 23.51(1) always contravenes article VIII, section 1-d-1(a) of the Texas Constitution. *See Texas Workers' Compensation Comm'n v. Garcia,* 893 S.W.2d 504, 518 n. 16 663 (Tex. 1995). *663 It contends that the Legislature and the voters believed that the amendment was intended only to "provide for an alternative valuation of land devoted to farming, ranching, or timber production." HOUSE COMM. ON CONSTITUTIONAL AMENDMENTS , BILL ANALYSIS, H.J.R. 1, § 2, 65th Legislature, 2d C.S. (1978). And it notes that it is the Court's duty to ascertain and give effect to the plain intent and language of the framers of a constitutional amendment and of the people who adopted it. *See City of El Paso v. El Paso Community College Dist.,* 729 S.W.2d 296, 298 (Tex. 1986).

We hold today that section 23.51(1) does not violate our Constitution. Two years ago we held "that the purpose of section 1-d-1 and sections 23.51 *et seq.* is to promote the preservation of open-space land devoted to farm and ranch purposes." *HL Farm Corp.,* 877 S.W.2d at 292. In reaching this conclusion, we specifically rejected an appraisal district's contention that the purpose underlying the Legislature's acts was merely "to preserve and benefit the family farm." *Id.* (quoting *Alexander Ranch, Inc. v. Central Appraisal Dist.,* 733 S.W.2d 303, 307 (Tex.App. — Eastland 1987, writ ref'd n.r.e.)). Today, we reject the district's similar argument that "farm and ranch purposes" means only traditional farming and ranching. The use of the word "purposes" indicates that the Legislature can give productive capacity appraisal to property that, although not strictly a farm or ranch, is devoted to the furtherance of farming and ranching purposes so long as the primary intent of the provision, the preservation of open-space land, is not violated. "The universal rule of construction is that legislative and executive interpretations of the organic law, acquiesced in and long continued,

. . . are of great weight in determining the validity of any act, *and in case of ambiguity or doubt will be followed by the courts.*" *Mumme v. Marrs,* 120 Tex. 383, 40 S.W.2d 31, 35 (1931). In this case, the Legislature and political subdivisions have consistently interpreted "open-space land devoted to farm or ranch purposes" to include ecological laboratories. Indeed, the district appraised Nootsie's property based upon its productive capacity for eleven years before abruptly deciding that the statute was unconstitutional; the Travis County Appraisal District likewise has repeatedly reaffirmed its view that an ecological laboratory qualifies for productive capacity taxation.

To prevail on a facial constitutional challenge, the district bears the heavy burden of showing that every application of section 23.51(1) violates the Constitution. The district has not carried that burden. As stipulated in the trial court, one of the studies being conducted at the time of trial at the Nootsie ecological laboratory concerned the preservation and enhancement of native grasses for grazing purposes on ranch lands. Other examples of the uses of Nootsie's land include long-term studies of ecological succession, studies of canyon vegetation, studies of the effects of urbanization on the Edwards Plateau, soil sampling, and studies of meadow grasses. The record shows that the research performed on an ecological laboratory such as the one situated on Nootsie's land comports with article VIII, section 1-d-1(a) of the Texas Constitution.

IV

We hold that the district had standing to file its counterclaim and that Nootsie waived its complaint about the district's capacity to file the counterclaim. We further hold that the Legislature did not exceed its constitutional mandate when it included ecological laboratories in the definition of qualified open-space land in Tax Code section 23.51(1). We therefore reverse the judgment of the court of appeals and render judgment that section 23.51(1) does not violate the Texas Constitution.

GONZALEZ, J., filed a concurring and dissenting opinion.

GONZALEZ, Justice, concurring and dissenting.

I concur with Part II of the Court's opinion concerning standing. However, for the reasons set forth in its opinion, I agree with the court of appeals that section 23.51(1) of the Texas Tax Code is unconstitutional. 905 S.W.2d 289.

As the Court acknowledges, article VIII, sections
664 1(a) and 1(b) of the Texas Constitution *664 require that taxation shall be equal and uniform and that land shall be taxed in proportion to its value. In order to deviate from this norm, the Legislature submitted a constitutional amendment, article VIII, section 1-d-1, to the voters. According to the legislative history of this amendment, its purpose was to "[p]rovide for an alternative valuation of land devoted to farming, ranching, or timber production. . . ." HOUSE COMM. ON CONSTITUTIONAL AMENDMENTS , BILL ANALYSIS, H.J.R. 1, § 2, 65th Leg., 2d C.S. (1978). The ballot submitted to the voters for approval described the proposed amendment as: "The constitutional amendment providing for tax relief for residential homesteads, elderly persons, disabled persons and agricultural land. . . ." H.J.R. 1, CONFERENCE COMMITTEE REPORT, 65th Leg., 2d C.S. (1978). There was absolutely no mention of ecological laboratories in any promotional materials or in news stories or in editorials at the time the amendment's passage was being promoted. Voters were kept completely in the dark that property with only indirect agricultural purposes, such as ecological laboratories, would qualify for favorable tax treatment.

The Court is swayed by the fact that the appraisal district "appraised Nootsie's property based upon its productive capacity for eleven years before abruptly deciding that the statute was unconstitutional. . . ." 925 S.W.2d 663. This fact is irrelevant to the question of whether the

Legislature has authorized something which the Constitution prohibits. Equitable estoppel and laches have no bearing on the question.

In conclusion, the voters who ratified article VIII, section 1-d-1 of the Texas Constitution have been deceived. They were told one thing and the Legislature did another. The Legislature gave favorable tax treatment to a company that does not operate a farm or ranch of any kind in connection with its ecological laboratory, and raises no crops or animals for human or animal consumption. Is it any wonder that people become cynical and disillusioned with government?

No. 6351
Supreme Court of Texas

Permian Oil Co. v. Smith

129 Tex. 413 (Tex. 1934) · 73 S.W.2d 490
Decided Jun 19, 1934

No. 6351.

Decided June 19, 1934. Rehearings overruled April 7, 1937; May 17, 1937.

1. — Trespass to Try Title — Judgment.

A judgment in an action of trespass to try title to land that plaintiff take nothing is an adjudication that title rests in defendant.

2. — Judgment — Trespass to Try Title — Estoppel.

In an action of trespass to try title it is not material upon what ground the trial court based its judgment in favor of plaintiff's predecessor in title if he were entitled to same upon the failure of ancestor of defendants to establish their claim and said judgment would estop them from bringing a subsequent action.

3. — Burden of Proof — Trespass to Try Title.

The burden was upon plaintiff to furnish proof as to the identity of land described as a particular section with such certainty that the court might determine whether defendant had in effect ousted plaintiff from possession.

4. — Judgment.

A judgment can not be contradicted by showing that the issues raised in the case in which it was rendered were not in fact decided as shown by the statement of facts incorporated as a part of the record.

5. — Judgment — Findings of Fact — Appeal and Error.

While findings of fact are no part of a court's judgment, they are required to be made for the purpose of an appeal, as they serve a useful purpose of disclosing upon appeal the reasons for the court's judgment. However, in a collateral proceeding they can not be used to show an erroneous judgment which can only be assailed by direct attack.

6. — Findings of Fact — Judgments — Collateral Attack.

Findings contrary to the judgment are not conclusive as to the matter found and would not render the judgment void and subject to collateral attack, but would merely make the judgment erroneous and subject to correction upon appeal.

414 *414

7. — Survey.

In a question of boundary a call for distance must yield to a call for a stake, even though it could not be found, if there was evidence offered as to its proper location.

8. — Judgment — Collateral Attack.

Where court acquires jurisdiction by the filing of the petition which shows the cause on its merits to be within its jurisdiction, the judgment of said court can not be collaterally attacked on account of a defect in the pleadings which are subject to amendment even though they might be bad on general demurrer.

9. — Trespass to Try Title — Boundary.

In a case of trespass to try title plaintiff may assert right to try title of one survey, the controversy concerning which may involve the question as to the boundary between it and another section, but such controversy would not constitute a boundary suit.

10. — Judgment — Title.

Where in a former suit a judgment that plaintiff take nothing operated to divest him of whatever title he might have had and vest it in defendant, such judgment constituted a muniment of title in defendant and was available for the purpose of establishing title in those under him even against the claim of strangers.

11. — Trespass to Try Title — Estoppel.

In a suit of trespass to try title party is not estopped from assuming a position wholly inconsistent from that assumed in a former suit, unless the new action is between the same parties.

12. — Judgment — Clerk — Records.

Where one officer is required by law to be not only the clerk of the county court but also the clerk of the district court he must maintain two sets of record books and the entry of a judgment in the minutes of the district court is not a substantial compliance with the terms of the statute requiring that it be recorded in the office of the county clerk.

13. — Trespass to Try Title — Judgment — Innocent Purchaser.

In a suit of trespass to try title burden was upon defendants to show that they acquired land for value and without notice of rendition of judgment, when they are claiming same as bona fide purchasers without notice of judgment in favor of plaintiff's predecessor.

14. — Vendor and Purchaser — Notice.

Actual possession of land by plaintiff's predecessor, at time defendants acquired rights in the land, would be sufficient to constitute constructive notice to defendants of plaintiff's claim to land through his predecessor.

15. — Vendor and Purchaser — Notice — Probate.

When the apparent title to land was in husband at time of his death, purchaser from widow was not put upon notice or inquiry requiring an examination of inventory filed in connection with probate of husband's will as to whether land was listed further than to examine the link necessary to perfect an apparent title in widow of the deceased land owner.

16. — Vendor and Purchaser — Trespass to Try Title.

In a suit of trespass to try title it would be permissible, upon the question of whether defendants were purchasers without notice that title had been divested out of their grantor and vested in plaintiff's predecessor, to show that
415 defendants *415 at the time they acquired title through their grantor had actual notice of the omission of certain land from the inventory filed by their predecessor in the probation of her husband's will.

ON REHEARING.

17. — Judgment — Record — Evidence.

Every part of the proceeding of a trial in a court of record, including the findings of fact and conclusions of law, constitutes the "judgment roll," "judgment record" or "face of the record," and are admissible in evidence in a subsequent proceeding in trespass to try title to support the judgment of the former suit on the issue of res adjudicata.

18. — Res Adjudicata — Judgment — Collateral Attack.

The principle of res adjudicata is founded upon public policy and its fundamental purpose is to put an end to litigation and preserve the sanctity of judgments by making them immune from collateral attack, and is an absolute bar to the retrial of the same cause of action between the same parties on the theory that it has been merged into a judgment, which permits of no inquiry into the balance of the record, except where such judgment is ambiguous in which case extrinsic evidence may be admitted to aid in its construction.

19. — Judgment.

Judgments are construed like other written instruments, and a judgment is not ambiguous because of a reference therein to the pleading of plaintiffs when such reference makes the description of the land the cause of action disposed of as effectively a part of the judgment as though both had been recited on its face.

20. — Trespass to Try Title — Judgment.

Where the contention in a trespass to try title suit is a collateral attack on the judgment in a former suit between parties predecessors, it must be judged by the pleadings and judgment in that case unless same, because of ambiguity, is limited by the judgment roll.

21. — Judgment — Res Adjudicata.

In a suit brought in the form of a trespass to try title, though disposed of solely on the issue of boundary, a take nothing judgment would be res adjudicata of the issue of title in a subsequent suit brought by successor of defendant in former suit against successor of plaintiff in said suit, the pleadings in the prior suit having been in statutory form.

22. — Trespass to Try Title — Possession — Title.

Where the plaintiff in a trespass to try title suit brought in statutory form failed to establish superior title, a take nothing judgment left defendant in possession and such possession imported title.

23. — Title — Judgment.

While the party in possession of land is presumed to be the owner thereof until the contrary is proven, no judgment can establish title or right of possession in a litigant against the world, but such established title or right is limited to the parties bound by the judgment.

24. — Pleading — Trespass to Try Title.

A petition limited to the statutory form of trespass to try title always puts in issue both the title and possession and if the plaintiff wishes to limit the issue to only one of such facts he must do so by a special pleading in appropriate form. *416

25. — Judgment — Evidence.

In a suit where judgment was unambiguous, the judgment roll was properly admitted in evidence to test the validity of such judgment, but not to contradict or explain or interpret it.

26. — Trespass to Try Title — Judgment.

A judgment in a trespass to try title suit that plaintiff take nothing operates as a muniment of title and adjudges that sufficient facts were found to establish title in defendant to the land, as though it had passed by voluntary conveyance.

27. — Deeds — Registration — Judgment — Notice — Burden of Proof.

Under our registration statutes the holder of a judgment may introduce same in evidence to make out a prima facie case, but when subsequent purchaser introduces a conveyance taken while the senior deed was off the record the burden rests upon the unrecorded deed holder to show notice or lack of consideration on the part of the junior deed holder.

28. — Judgment — Evidence.

In a trespass to try title suit it was improper to refuse to admit in evidence the unrecorded judgment in a prior trespass to try title action, offered by plaintiff, before the defendants offered evidence to show title by their purchase at a time when plaintiff's judgment was off the record.

29. — Res Adjudicata.

The fact that a party could have prevailed in former suit, had he exercised sufficient diligence, does not prevent the application of the doctrine of res adjudicata to bar recovery by the successor of such party.

Error to the Court of Civil Appeals for the Eighth District, in an appeal from Pecos County.

Suit by the Permian Oil Company, a remote vendee of T. F. Hickox, against Mrs. M. A. Smith, the surviving widow and sole devisee and independent executrix of the estate of her first husband, John Monroe, and against her second husband, M. A. Smith, and her immediate and remote vendees and certain oil and pipe line companies, in trespass to try title and to recover title and possession of a tract of 407 acres of land, described as survey No. 103 in block No. 194, Texas Central Railroad Company, in Pecos County, Texas, and to recover damages growing out of waste and wrongful appropriation of royalty oil and gas produced from the said 407 acre tract which had been run from such survey by the oil and pipe line companies. A further statement of the facts will be found in the opinion. Upon an instructed verdict the trial court rendered judgment in favor of the defendants, which judgment was affirmed by the Court of Civil Appeals (47 S.W.2d 500) and the Permian Oil Company has brought error to the Supreme Court.

The case was submitted to the Court sitting with the Commission of Appeals and the opinion written by MR. JUDGE LEDDY of the Commission (reversing the judgments and
417 remanding *417 the case for another trial) was adopted by the Supreme Court. Pending motions for rehearing a change took place in the personnel of the Court and the Commission, as stated in the opinion on motions for rehearing, and MR. JUSTICE CRITZ, having certified his disqualification, Honorable ELWOOD FOUTS was appointed as Special Associate Justice to sit with the Court in the determination of the motions. The Court requested oral argument on the motions, which were later overruled with a written opinion by MR. SPECIAL ASSOCIATE JUSTICE FOUTS, with a dissenting opinion by MR. CHIEF JUSTICE CURETON.

J. B. Dibrell, Sr., of Seguin, *Dibrell Starnes,* of Coleman, *John Jack Sayles,* of Abilene, *Hart Johnson,* of Fort Stockton, and *Critz Woodward,* of Coleman, for plaintiff in error.

The plaintiff's petition in suit between former contestants of boundary line, having been in statutory form of trespass to try title describing the land by section and block numbers and name of original grantee as well as by field notes and monumental corners and defendant having answered in statutory form of not guilty, the judgment that plaintiff take nothing and that defendant go hence without day was not void, but was and is valid and admissible in evidence. McCamant v. Roberts, 66 Tex. 260; Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063; Simmons v. Arnim, 110 Tex. 309, 220 S.W. 66.

Where first amended original petition of the plaintiff in the former suit stated a cause of action in the form of trespass to try title against defendant it was not subject to general demurrer or a motion in arrest of judgment. Plummer v.

Marshall, 126 S.W. 1162 (writ refused); Boydston v. Sumpter, 78 Tex. 402, 14 S.W. 996; Boon v. Hunter, 62 Tex. 582.

The judgment in connection with the pleadings on which it was based in the former suit between adjoining land owners, as to boundary, being a final and conclusive adjudication of title and right of possession divesting the plaintiff in that suit, was admissible in evidence as a muniment or link in the chain of title of a vendee of the defendant in the former suit and plaintiff in the latter suit for title and possession of said tract of land, the tender of said evidence having been preceded by the introduction of a regular and consecutive chain of title to said tract of land from the State down to the plaintiff in that suit followed by the introduction in evidence of a regular chain of muniments of title down to the plaintiff in the later case. Bone v. Walters, 14 Tex. 564; Barr v. Gartz's
418 Heirs, 4 Wheat (U.S.) 212, 4 L.Ed. 553. *418

The vital issue under the pleadings in the former suit being the title and right of possession of the land in controversy in the present suit, the ownership of which was claimed by both parties in that suit, the fact that the possible boundary conflict between that survey and one owned by the defendant in that suit and not claimed by the plaintiff did not make that case one of boundary. Cox v. Finks, 91 Tex. 318, 42 S.W. 1052, 43 S.W. 1; Schley v. Blum, 85 Tex. 551, 22 S.W. 667.

Even though it were conceded that plaintiff in the case at bar takes a position inconsistent with the position or contention of its predecessor-defendant in boundary suit wherein a take nothing judgment was rendered against the plaintiff, when it establishes here by legal and competent evidence the location on the ground and shows there is no conflict between it and another survey, plaintiff is nevertheless not estopped to establish such facts by reason of such inconsistency, because none of the defendants herein are privy to, but are all strangers to the controversy between plaintiff predecessor and those claiming against him. Hussman v. Durham, 165 U.S. 144, 41 L.Ed. 664; Heard v. Vineyard, 212 S.W. 489; Freeman on Judgments, 5th ed., 961.

On question of plaintiff's right to an instructed verdict and for damages for waste of royalty oil prior to May 31, 1930. Patrick v. Smith, 90 Tex. 267, 38 S.W. 17; Stevens v. Masterson, 90 Tex. 417, 39 S.W. 292, 921.

W. A. Keeling and *Black Graves,* of Austin, *F. H. DeGroat,* of Duluth, Minn., *Maxey, Holden Holloman* and *Chas. H. Holden,* and *John Rogers,* all of Tulsa, Okla., *Chas. Gibbs, H. O. Williams, Gibbs Lewis, John M. Davenport, Harris, Harris Sedberry, Smith Neill, Robt. T. Neill, James Cornell, J. W. Stovall, R. G. Hughes* and *D. B. Hardeman,* all of San Angelo, *Hiner Pannill, Phillips, Trammel, Chizum, Price, Estes Edwards, Burney Braley,* all of Fort Worth, *Thompson, Knight, Baker Harris,* of Dallas, *Baker, Botts, Andrews Wharton, Clarence Wharton, Rex G. Baker,* and *R. H. Whilden,* all of Houston, *W. C. Jackson,* of Fort Stockton, *Brian Montague,* of Del Rio, *Thompson, Mitchell, Thompson Young,* and *Lyold L. Adams,* all of St. Louis, Missouri, for defendants in error.

A judgment in another suit among other parties, did not constitute a muniment of title in favor of plaintiff, nor a link in its chain of title, and was therefore properly excluded. Bone v. Walters, 14 Tex. 564; Blaffer v. State, 31 S.W.2d 172; Ellis v.
419 LeBow, 96 Tex. 532, 74 S.W. 528. *419

The judgment in a former suit wherein plaintiff's predecessor in title took a take nothing judgment against the plaintiff, together with the petition and answer therein, and all legal and competent extrinsic evidence offered by the plaintiff in the case at bar on the trial, are insufficient to establish a prima facie right in the plaintiff to recover the land sued for by it herein. Nichols v. Dibrell, 61 Tex. 541; Goldman v. Douglas, 81 Tex. 648, 17 S.W. 235; Linney v. Wood, 66 Tex. 22.

When a judgment is introduced in evidence, extrinsic evidence is not admissible to vary or contradict it, if, on its face, it adjudicates a certain matter, but if, upon inspection of the judgment itself it is uncertain as to what was adjudicated extrinsic evidence is admissible to show what was at issue and decided by the decree. Cook v. Burnley, 45 Tex. 97; Hume v. Schintz, 90 Tex. 72, 36 S.W. 429; Hughes v. Driver, 50 Tex. 175.

Walter L. Kimmel, of Tulsa, Okla., filed brief as amicus curiae.

MR. JUDGE LEDDY, of the Commission, delivered the opinion of the Court.

This is a statutory action of trespass to try title for the recovery of the title and possession to a tract of 407 acres of land described as Survey 103, Block 194, T. C. Railway Company in Pecos County, Texas, and to recover damages growing out of the waste and wrongful appropriation of royalty oil and gas produced from such land. The royalty on the oil amounted to $431,067.15 on May 1, 1930.

The suit was instituted by plaintiff in error, Permian Oil Company, remote vendee of Hickox, as plaintiff, against Mrs. M. A. Smith, surviving widow, sole devisee and independent executrix of the estate of her deceased first husband, John Monroe, and against her second husband, M. A. Smith, and her immediate vendees, and the oil and pipe line companies running oil from such survey.

Mrs. Monroe Smith died before the trial of the case, and the administrator of her estate and her heirs were properly substituted as parties defendant.

Upon a trial with a jury plaintiff in error, by proper documentary evidence, established a regular chain of title from the State of Texas down to John Monroe, vesting in him title to Section 103, Block 194, T. C. Railway Company, and Section 35, Block 194, G. C. S. F. Railroad Company in Pecos County, Texas. *420

Plaintiff in error offered in evidence the following additional documentary evidence:

1. The original petition filed by John Monroe on August 22, 1910, showing a statutory action of trespass to try title in Cause No. 854, styled John Monroe, plaintiff, vs. T. F. Hickox, defendant, in the District Court of Pecos County, Texas, for the title and possession of three tracts of land situated in said county, being all of Section 104, Block 194, T. C. Railway Company, original grantee, a part of Section 103, Block 194, T. C. Railway Company, original grantee, and a part of Survey 35, Block 194, G. C. S. F. Ry. Company, original grantee.

2. The first amended original petition filed by John Monroe on February 28, 1911, in a statutory form of trespass to try title in said Cause No. 854, said amended petition being as follows:

"In the District Court of Pecos County, Texas,

February Term A.D. 1911. John Monroe vs. T. F. Hickox, No. 854.

"To the Honorable District Court of Said County:

"Now comes John Monroe who resides in Pecos County, Texas, hereinafter called plaintiff, and leave of the Court having first been had and obtained, files this his first amended original petition and complains of T. F. Hickox, hereinafter styled defendant, and for cause of action, plaintiff represents to the Court that on or about the 21st day of April A.D. 1909, he was lawfully seized and possessed of the following described land and premises, situated in the County of Pecos, State of Texas, holding and claiming the same in fee simple, to-wit:

1st.

"All of Section No. 104, Block 194, T. C. Ry. Co. original grantee, situated in Pecos County, Texas.

2nd.

"All of Section No. 103, Block 194, T. C. Ry. Co. original grantee situated in Pecos County, Texas, described as follows:

"Beginning at a stake and mound at the N.E. Cor. of Sur. No. 102, Blk. 194, T. C. R. R. Co., Cert. 2302, for the N.W. Cor. of this survey.

"Thence east 1900 vrs. to a stake and mound for the N.E. Cor. of this survey.

"Thence south 1209 vrs. to a stk. and md. for the S.E. Cor. of this survey.

"Thence West 1900 vrs. to a stk. and md. for the
421 S.W. Cor. of this survey. *421

"Thence North 1209 vrs. to the place of beginning. And said Section No. 104, Block No. 194, T.C. Ry. Co. is described by metes and bounds as follows, to-wit:

"Beginning at a stake and mound at the N.E. Cor. of Survey No. 103, Block No. 194, for the N.W. Cor. of this survey.

"Thence East 1900 vrs. to stake and mound for N.E. Cor. of this survey.

"Thence South 1209 vrs. to stake and mound for S.E. Cor. of this survey; thence West 1900 vrs. to stake and mound for S.W. Cor. of this survey; thence North 1209 vrs. to the place of beginning.

"That on the day and year last aforesaid, defendant unlawfully entered upon the premises and ejected plaintiff therefrom and unlawfully, withholds from him the possession thereof to his damage in the sum of $2,000.00. That the reasonable rental value of said land and premises is $100.00 per annum; that on the date that defendant entered upon plaintiff's said land, plaintiff had on same a wire fence composed of wire nailed on the posts set in the ground, that defendant has since said date, broke, tore down and destroyed plaintiff's said fence and the posts and wire composing the same, to the plaintiff's damage in the sum of $100.00.

"Therefore, plaintiff prays judgment of the court that inasmuch as the defendant has been duly cited to appear and answer this petition, that plaintiff have judgment for the title and possession of said lands and premises above described, and that writ of restitution issue, and for his rents, damages and costs of this suit, and for such other relief, special and general, in law and in equity, that he may be justly entitled to, etc."

3. The original answer of defendant T. F. Hickox in said cause, which consisted of a general denial, and a plea of not guilty.

4. The judgment rendered and entered in the minutes of the district court of Pecos County in said Cause No. 854, which is as follows:

"In the District Court of Pecos County, Texas.

Feb. Term 1911. John Monroe vs. T. F. Hickox. No. 854.

"On the 28th day of February A.D. 1911, came on to be heard the above numbered and entitled cause in its regular order on the docket, and thereupon came the plaintiff in person and by attorney, and also came the defendant in person and by attorney, and all parties announced ready for trial, and no jury having been demanded and all issues of law
422 and fact being *422 submitted to the court, the pleadings were thereupon read, the evidence introduced and argument of counsel made, and the court after hearing same, thereafter on the 4th day of March A.D. 1911, in open court pronounced judgment in favor of the defendant. It is therefore ordered, adjudged and decreed by the court that the plaintiff John Monroe take nothing by his suit against the defendant T. F. Hickox, and that the defendant T. F. Hickox, go hence without day and recover against the plaintiff John Monroe all costs of suit, for which execution will issue. To which judgment of the court the plaintiff John Monroe in open court excepted and gave notice of appeal to the Court of Civil Appeals of the 4th Supreme Judicial District of Texas, sitting at San Antonio, Texas, and upon plaintiff's request and good cause

being shown he is hereby given sixty days after the adjournment of this court within which to file his statement of facts herein."

5. Probate proceedings in the estate of T. F. Hickox, including his probated will, whereby he devised all of his estate to his surviving wife, Leona A. Hickox, and appointed her independent executrix.

6. A regular chain of title from Mrs. Leona A. Hickox individually and as sole devisee and independent executrix of the will and estate of her deceased husband, T. F. Hickox, to plaintiff in error, Permian Oil Company.

7. Parol and written evidence of the location on the ground of Survey 103.

8. Evidence of the amount and value of the oil produced from Survey 103, the 1/8 royalty oil produced from said land from September 16, 1927, to May 31, 1930, amounted to 586,014.25 barrels, of the market value of $431,067.15.

Objections were made by some of the defendants to the pleadings and judgment in Cause No. 854, Monroe v. Hickox. These objections were overruled at the time the evidence was offered, and these records were admitted in evidence. At the conclusion of the testimony offered by plaintiff in error, the defendants in error, with the exception of the oil and pipe line companies, presented a motion to strike out the pleadings and judgment in Cause No. 854, John Monroe v. T. F. Hickox, introduced in evidence by plaintiff in error as a link in its chain of title; and said defendants also moved that the jury be peremptorily instructed to return a verdict in their favor.

In support of the motion of defendants in error, Jerry Monroe, et al., to strike out such pleadings and judgment, they *423 tendered, and the trial court considered in evidence, the papers in Cause No. 854, Monroe v. Hickox, including the findings of fact and conclusions of law. Such findings of fact and conclusions of law are as follows:

"FINDINGS OF FACT.

"1. Block C-4, G. C. S. F. Ry. Co., is composed of sixty-four surveys. The field notes show that they were all made by H. C. Barton, Deputy Surveyor of Pecos County, between the 5th and 20th days of October, 1881. According to the field notes of Survey No. 4, of this block, the Northwest corner was marked as follows: 'Pile of pebbles for the N.E. Corner of Survey No. 3, this block from which capstone mountain bears south 1500 varas,' the Northeast corner is described as 'Stone mound from which capstone mountain bears S. 19 E and another capstone mountain bears N. 70 E.' Corners answering to this description were found on the ground located relatively as shown in the sketch of surveyor W. T. Hope.

"2. Block Z, Texas Central Railway Company is composed of fifty-four surveys. They were made by F. Schadowsky, between the 4th and 8th days of November, 1882. The beginning calls of this block tie on to Block C-4. There is no testimony locating this block on the ground.

"3. Block 194, G. C. S. F. Ry. Company is composed of One Hundred surveys, the record showing they were made by L. W. Durrell, Deputy Surveyor of Pecos County, between the 17th and 31st days of May, 1883. It appears that he made fifteen surveys on each of the first six days and ten surveys on the seventh day. The beginning calls of this block tie on to Block Z, G. C. S. F. Railway but there is no testimony locating on the ground any of the original land marks called for in the field notes.

" *3.* Block No. 178, Texas Central Railway company is composed of thirty-six surveys, the record showing they were made by L. W. Durrell, Deputy Surveyor of Pecos County. The first eighteen of these surveys appear to have been made on November 21, 1882, and the last eighteen made on November, 22, 1882. The beginning call starts at river survey at No. 543, in the name of H.

G. N. Railway company. None of the land marks called for by the field notes of this block were located on the ground by any of the testimony.

"4. The river surveys shown on the map of surveyor W. T. Hope were made in the year 1876 by Jacob Kuechler, Deputy Surveyor of Pecos County Survey 4 of Block C-4, G. C. S. F. Railway Company was located on the ground from objects found corresponding to the calls for
424 its northeast and northwest *424 corners relatively as shown on Hope's map. Survey 71, I. G. N. Railway on the Pecos River was located on the ground relatively as shown in the map of surveyor W. T. Hope, with its Northwest corner marked by stone mound; there is no call in the field notes for a stone mound at this point. Survey No. 51, I. G. N. Railway was located on the ground relatively as shown on Hope's map by course and distance from the Northwest corner of Survey 71, established as aforesaid, and its location verified by a call of its field notes for road on a mesa. Survey No. 3, Runnels county school land was located on the ground by course and distance based on Surveys 71 and 61, which were located on the ground as aforesaid. All of these locations were made on the ground by surveyor W. T. Hope and were based on actual runnings as shown by the red lines delineated on his map. The balance of the surveys shown on the map of surveyor Hope were platted in by him according to their calls for course and distance based on his actual work on the ground shown by the red lines, and with relation to the aforesaid land marks.

"5. By beginning at the Northeast corner of Survey 4, Block C-4, G. C. S. F. Railway Company, as found on the ground, and running by course and distance and thereby locating surveys 103 and 104, Texas Central Railway; these two surveys would lie adjoining and immediately south of Survey 3, Runnels County School land, and would not conflict with surveys 34 and 35, Texas Central Railway.

"6. By constructing Block 194, G. C. S. F. Railway, based on the calls for the river surveys, as located on the ground Surveys 34 and 35, G. C. S. F. Railway Company, Block 194 would lie adjoining and immediately south of Survey No. 3, Runnels County School land and be in total conflict with surveys 103 and 104.

"7. Surveys 103 and 104 being the land sued for by plaintiff, are junior surveys to surveys 34 and 35.

"8. I am unable to follow the footsteps of the original surveyor in establishing Block 194, G. C. S. F. Ry. either in the original locations of any of the sections or in the location of the corrected surveys, and I am unable to ascertain the true intention of the original surveyor as to locating this block on the ground.

"9. I am unable from the testimony in evidence to ascertain the true location on the ground of Surveys Nos. 103, 104, 34 and 35 above referred to.

"10. I find that Block 194, G. C. S. F. Railway was
425 originally located by an office survey. *425

"11. I find that the calls of block 194 to tie to Block Z and its calls to tie on to the river surveys are repugant to each other and inconsistent, and I am unable to determine which of these calls should be regarded as a mistake of the surveyor.

"12. I find that the plaintiff is the legal owner and holder of the fee simple title to Survey No. 103, Texas Central Railway and that he holds survey No. 104, under a contract of purchase from the State of Texas, in accordance with the school land laws and that he has made his proof of occupancy thereon as required by law, and that his said sale is in good standing.

"13. Defendant is the holder and entitled to the possession of Survey No. 34, under a contract of purchase from the State of Texas, in accordance with the school land laws, and his sale is in good standing.

"14. The said Hope map is hereby referred to and made a part hereof."

"CONCLUSIONS OF LAW.

"1. The burden of proof is upon the plaintiff to establish the location of the two tracts of land sued for upon the ground, and to show that there is no conflict between said surveys and surveys numbers 34 and 35, the said surveys numbers 34 and 35 being senior surveys.

"2. It is presumed that the work of an official surveyor was actually done on the ground, but the amount of work he certified to having done within a given time, the character of the work as called for by the field notes, and the lack of evidence found on the ground, discrepances in distances betwen objects called for and the like, may be sufficient to rebut said presumption.

"3. Where there are two theories upon which a survey which is not fixed to the ground by any of its calls can be constructed, and one theory shows a conflict between a senior and a junior survey, and the other theory shows no conflict between them and the evidence, aided by the presumptions of law, furnishes no method for following the footsteps of the original surveyor or for arriving at the intent and purpose of the original surveyor, the presumption of law will be resolved in favor of the senior survey that there is a conflict, the owner of the junior survey being the plaintiff.

"4. Having found as a fact that the location of surveys numbers 34 and 35, and 103 and 104, cannot be located upon the ground from the testimony in evidence and that there is a total conflict between them based on certain calls and no conflict based on other calls which theories are irreconcilable and the true theory unascertainable
426 from the testimony, I conclude *426 that the plaintiff should take naught by this suit and that the defendant should recover his costs herein."

Plaintiff in error requested the court to submit the case to the jury on special issues, but the request was overruled. Thereupon it moved the court to instruct peremptorily the jury to render a verdict in its favor against the oil and pipe line companies; this motion was also overruled.

The trial court sustained the motion of Jerry Monroe, et al., and struck from the evidence the pleadings and judgment in Cause No. 854, John Monroe v. T. F. Hickox, to which action and ruling plaintiff duly excepted. The court then on motion of certain defendants, and of his own motion, instructed the jury to return a verdict for defendants in error, and upon such instructed verdict judgment was accordingly rendered against plaintiff in error.

Plaintiff in error duly prosecuted its writ of error to the Court of Civil Appeals at El Paso. This resulted in an affirmance of the judgment of the trial court.

The voluminous nature of the record in this case will appear from a recital of the fact that the writ of error filed in this Court consists of nearly 400 pages, while the briefs of all the parties total more than 3000 pages.

There are a number of legal questions presented for determination. The main question is whether the judgment in Cause No. 854, Monroe v. Hickox, constituted a valid muniment in plaintiff in error's chain of title.

Defendants in error seek to sustain the action of the trial court in excluding the judgment in Cause No. 854, Monroe v. Hickox, upon the following grounds:

a. It is proper to construe said judgment in the light of the findings of fact and conclusions of law and when so construed the judgment must be declared void because it determines and settles nothing.

b. The record in said cause shows that the plaintiff's suit was one of boundary and that it was tried and determined as such by the court.

c. The judgment in said cause is void because when interpreted in the light of the pleadings and the findings of fact and conclusions of law there is not sufficient description of any land as will permit its being identified and located on the ground.

d. Monroe's first amended petition in Cause No. 854 was insufficient to support a judgment for either party, since it failed to meet the essential requirements of subdivision 2, Article 7366, R. S. 427 1925, which is the same as subdivision 2, *427 Article 5250, R. S. 1895, which was in force at the time said judgment was rendered.

e. In said Cause No. 854 the defendant Hickox successfully maintained that the boundaries called for in the patent for Section 103 owned by Monroe were in conflict with Survey 34 (the senior survey) owned by Hickox, and that inasmuch as Hickox has long since parted with his title to Survey 34, those claiming under him should not now be heard to say that Section 103 is not a part of Survey 34.

Defendants in error further assert that the judgment in Cause No. 854, Monroe v. Hickox, was not admissible in evidence against defendants in error H. B. Davenport, Nellie M. Hill and husband, J. R. Hill, Sam K. Viersen, K. N. Hapgood, Frank T. Pickrell, Max Gutman and Benjamin Gutman, J. A. Chapman, Peerless Oil Gas Company, Metropolitan Royalty Corporation, G. S. Davis, J. R. Parten, Marland Employees Royalty Company, Southland Royalty Company and Empire Gas Fuel Company for the following reasons:

1. Because said judgment was not recorded in the office of the county clerk of Pecos County, Texas, as required by Article 6638, R. S. 1925, and Article 6835, R. S. 1911, prior to the time the above named defendants in error purchased their mineral interest and mineral estate from Mrs. M. A. Smith and her husband.

2. The entry of a judgment in the minutes of the District Court of Pecos County should not be construed to constitute a recording of such judgment in the office of the county clerk as required by the above named articles.

3. The fact that the offices of the county and district clerk are held by the same person does not affect the requirement that the failure to record a judgment by which the title to land is recovered in the office of the county clerk render such judgment inadmissible in evidence in support of any right claimed by virtue thereof.

4. The burden rested upon the plaintiff in error to show as a predicate for the introduction of said judgment that the defendants in error before named had either actual or constructive knowledge of said judgment, and that they were not bona fide purchasers for value.

1 The doctrine has been thoroughly settled by repeated decisions of the courts of this State that a judgment in an action of trespass to try title that plaintiff take nothing by his suit is an adjudication 428 that the title to the land involved is in the *428 defendant and such a judgment is equally as effective for that purpose as one expressly vesting title in the defendant. French v. Olive, 67 Tex. 400, 3 S.W. 568; Wilson v. Swasey, (Sup.) 20 S.W. 48; Hoodless v. Winter, 80 Tex. 638, 116 S.W. 427; Houston Oil Co. v. Village Mills Co., (Com. App.) 241 S.W. 122; Stark v. Hardy, 29 S.W.2d 967; Dunn v. Land, 193 S.W. 704; McAllen v. Crafts, 139 S.W. 44; Drummond v. Lewis, 157 S.W. 268; Bomar v. Runbe, 225 S.W. 287; Taylor v. W. C. Belcher Loan Mortgage Co., 265 S.W. 403.

The principle announced in these cases is but an application of the provision of the statute to the effect that any final judgment in an action to recover real estate shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all persons claiming through

or under him, by title arising after the commencement of the action. Art. 7391, R. S. 1925.

In discussing the conclusive effect of a judgment decreeing that the plaintiff take nothing in an action of trespass to try title, Justice GAINES, speaking for the Court in the case of French v. Olive, supra, said:

"When appellants failed to make out their case it was a matter of no concern whether appellee could show any title or not. They were entitled to a judgment forever conclusive of all claim of appellants to the premises in controversy. This would have been the effect of an entry in the usual form, that the plaintiffs take nothing by their suit, etc. The additions removing cloud and quieting defendants' title, added nothing to the former part of the judgment. * * * Appellees have been adjudicated that to which they were entitled by reason of appellants' failure to establish their title and no more."

The same doctrine was announced in Hoodless v. Winter, supra, wherein the Court observed:

"Under their plea of not guilty the defendants could have introduced any evidence in their possession tending to defeat any item or link under which the plaintiffs claimed or under which they themselves held. A judgment in their favor under that plea would have conclusively established their title against the plaintiff and all persons claiming under them. In the action of trespass to try title a judgment rendered against the plaintiff is as conclusive in favor of a defendant who pleads 'not guilty' as it is against the defendant when the plaintiff recovers under the same circumstances. The conclusive effect of such judgments is declared by Art. 4811 of the Revised
429 Statutes," etc. *429

"Where the plaintiff, as in this case," says the Supreme Court in Wilson v. Swasey, 20 S.W. 49, "fails to show title to the land, it can make no difference, when the judgment is against plaintiff, that, as between them, the land is decreed in defendant. It adds nothing to the force of the general judgment in such cases that 'plaintiff take nothing by his suit,' that title is declared to be in defendant as between plaintiff and defendant. French v. Olive, 67 Tex. 400, 3 S.W. Rep. 568. This is the effect of the usual judgment against plaintiff."

Numerous opinions of the courts of civil appeals have followed this declaration of the law by the Supreme Court and the present Court has adopted opinions of the Commission of Appeals in the late cases of Houston Oil Co. v. Village Mills Co., and Stark v. Hardy, above cited, reaffirming the rule announced in the cases from which we have quoted.

2 But defendants in error insist that the judgment in Cause No. 854, Monroe v. Hickox, must be construed in the light of the findings of fact and conclusions of law filed in the court in which such judgment was rendered, and that when so construed it appears that Monroe was denied a recovery of the land, not on account of his failure to establish a regular chain of title thereto, but because in the light of the testimony adduced there was shown a conflict between Survey 103 and Survey 34, the latter being the senior survey. It is not material in this controversy upon what ground the trial court based its judgment in favor of Hickox. Monroe, by his petition, put in issue his title to Section 103. If for any reason he failed to establish the same, Hickox was entitled to a judgment, the effect of which would be conclusively to estop Monroe and those claiming under him from bringing a subsequent action for a recovery of the same land under any title which he claimed at that time. Herman v. Allen, 103 Tex. 382, 128 S.W. 115; Hoodless v. Winter, 80 Tex. 638, 16 S.W. 427; Harris v. First National Bank, 224 S.W. 269; Evans v. McKay, 212 S.W. 680; Freeman v. McAninch, 87 Tex. 132, 27 S.W. 97; New York Texas Land Co. v. Votaw, 16 Texas Civ. App. 585[16 Tex. Civ. App. 585], 42 S.W. 138, 52 S.W. 125.

3 Since Monroe placed the title to Section 103 in issue in Cause No. 854, the burden rested upon him not only to exhibit to the court evidence establishing his chain of title to the land involved, but he was also required to offer sufficient proof as to the actual location of the land so that an officer seeking to enforce a writ of possession under a judgment in his favor could locate the same and restore him to the possession from *430 which he had been ousted without such officer being required to exercise judicial functions. In other words, it was Monroe's duty to furnish proof identifying the land described as Section 103 with such certainty that the court might determine whether Hickox had in fact ousted him from the possession thereof. The court was not justified in rendering a judgment, the effect of which would have been to take land from the possession of Hickox, unless the location of said land was definitely fixed upon the ground. A failure of Monroe to meet the burden thus imposed entitled Hickox to remain undisturbed in the possession of the land claimed by him. The judgment rendered did not disturb Hickox' possession. The statute specifically provides that such judgment shall be conclusive, not only as to the title established, but as to the "right of possession established in such action." This principle of law has been often declared in actions of trespass to try title. In the case of Jones v. Andrews, 62 Tex. 652, the Court said:

"If the boundary lines of the survey were not established by the evidence to the satisfaction of the jury so as to correspond with the description given in the petition of the boundary lines of the survey, the plaintiff failed in his action, and the verdict in such case ought to have been for the defendants, and thus ought the jury to have been charged, for the plaintiff can not recover in an action of trespass to try title otherwise than according to the description he has given of the land sued for."

"In the absence of extrinsic evidence identifying the property described in the tax foreclosure proceedings," say the Court in Welles v. Arno Co-Operative Irrigation Co., 177 S.W. 985, "plaintiff has failed to establish his title to the property for which he sues. There is no such evidence and in the absence thereof, no judgment could properly have been rendered except in defendant's favor, and a peremptory instruction to that effect should have been given."

It is urged that it is proper to consider the findings of fact and conclusions of law filed by the trial court in interpreting the judgment in Cause No. 854, Monroe v. Hickox, in order to ascertain what was actually decided by the court in that case. In this connection it is said that when the judgment is so considered, it is apparent that the question involved was solely one of boundary, that is, that the issue presented was whether Section 103 was in conflict with the land covered by Survey 34, a senior survey, to which Hickox admittedly held an equitable title.

4 A judgment can not be contradicted by showing that the *431 issues raised in the case in which it was rendered were not in fact decided as shown by the statement of facts incorporated as a part of the record. It was so held by our Supreme Court in Swearingen v. Williams, 28 Texas Civ. App. 559[28 Tex. Civ. App. 559], 67 S.W. 1061, as indicated by this language:

"The parol testimony offered to show that the court really did not decide the question of title was inadmissible. The statement of facts filed in that cause would be a part of the record for the purpose of appeal from that judgment had it been prosecuted, but upon this plea of res adjudicata, it was extrinsic evidence and no better than parol."

To the same effect is the holding in the case of Freeman v. McAninch, heretofore cited. The facts upon which that case was decided are so strikingly similar to those involved in the instant case that we quote at length from the opinion in that case:

"Where it appears from the record of a court having jurisdiction over the parties and subject matter, that an issue has been presented and decided, then the decision so made, so long as it is not set aside in some lawful manner, must be held conclusive upon the rights of the parties when the same issue is again presented; and in such cases extrinsic evidence can not be received to contradict the record, by showing that an issue necessarily involved in that cause was not presented and decided.

"That the court in which the former action was tried had jurisdiction over the parties to and subject matter involved in that controversy can not be questioned.

"What was the issue involved in that cause as shown by the record?

"An issue is the question in dispute between the parties to an action, and in the courts of this State that is required to be presented by proper pleadings.

"The record of the former action shows that plaintiff in his pleadings alleged, that he was the owner of a tract of land therein, particularly described, that defendants, without right, had taken possession of that, and that he was entitled to have it restored to him.

"It is conceded that the tract of 134 1/2 acres now in controversy is a part of the land so claimed.

"It shows that the defendants denied plaintiff's ownership, and controverted his right to possession; and to intensify this denial asserted right in themselves, and stated the manner in
432 which it was claimed that this accrued. *432

"Thus were the issues presented, and the leading issue was one of title; and the fact that the determination of that may have depended on a question of boundary could not change the character of the vital issue in the case; for that was but a question of fact, to be considered like any other fact in determining whether the issue of title to the land should be decided in favor of the one party or the other.

"What the issues made by the pleadings were is not left uncertain by the record.

"The record of the former action shows that the court instructed the jury, that the controversy between the parties was one of title to the land described in plaintiff's pleadings; that he had shown title to the Washington survey, and defendants had shown title to the Allen survey, after which they were instructed to determine whether the land described in plaintiff's petition was a part of the Washington survey, and in the event they so found, they were instructed to find for the plaintiff.

"The court decided the question of title to the respective surveys; and only submitted to the jury the question of boundary, on which title to the land then in controversy depended; but this did not eliminate the question of title to the land sued for.

"Questions of boundary are never the subjects of litigation within themselves, but so become only where some right or title is thought to depend on their determination; and the fact that the court submitted only that question to the jury does not leave uncertain the issue actually tried and determined in the former action, even if the charge be considered without reference to other parts of the record.

"The judgment was: 'It is therefore considered by the court, that the plaintiff, John D. Freeman, recover of the defendants, J. F. McAninch and Daniel McCray, the premises described and bounded as follows:' it describes the land as described in the petition, and then declares that for this 'He may have his writ of possession and his costs in this behalf expended, for which he may have his execution.'

"In petition for writ of error defendants alleged that plaintiff had 'recovered of and from the said defendants the certain tract of land sued for.'

"That judgment, in the light of the entire record, was an unequivocal judicial determination that the title to the land described in it was in the plaintiff, and that he was entitled to its possession, and the evidence offered to prove that such was not the issue presented and determined ought to have been
433 excluded. *433

"There is no decision in this State, nor elsewhere, so far as is known, which sanctions the admission of such testimony in the face of such a record."

In Cause No. 854 Monroe, by his petition, claimed that he was the owner of Survey 103 and that he had been ousted from the possession thereof by Hickox. He prayed that his title to the land be established and the possession thereof restored to him. Hickox' plea of not guilty put in issue the title and right of possession to said land. With the title and right of possession thus in issue, the court, after a trial, adjudged that Monroe had not introduced sufficient proof to entitle him to a judgment against Hickox, and judgment was accordingly rendered that plaintiff take nothing by his suit. There is no ambiguity in this judgment which would permit the introduction of extrinsic evidence to show what was actually decided. The judgment expressly adjudicates that Monroe had failed to establish title to the land sued for. If such judgment were in fact contrary to the findings of the trial court, it was merely an erroneous judgment from the binding effect of which Monroe could have been relieved only through the medium of an appeal.

The admission of extrinsic evidence to show what issues were adjudicated in an action of this character was denied by the Court in the case of New York Texas Land Co. v. Votaw, 52 S.W. 125. It was there determined that the trial court properly refused to admit a bill of exception filed in the case by the same party in the Federal court showing all of the evidence adduced on the trial, and to permit parol testimony to show what issues were actually adjudicated in that case. In denying the right to introduce such evidence the Court said:

"The court did not err in refusing to admit in evidence the bill of exceptions filed in the case of the New York Texas Land Co., Limited, against William Votaw in the Federal court, showing all the evidence adduced on the trial in that case, nor in refusing to admit parol testimony offered by appellant to show what issues were actually adjudicated in that cause. There is no uncertainty about what the issues were, or what was adjudicated, in that case. Those issues were clearly made and sharply drawn by the pleadings of the respective parties, and no doubt can be entertained as to what those issues were nor what was adjudicated. An issue is a question in dispute between the parties to an action, and in the courts of this State it is required to be presented by the pleadings. The petition and answer in that case
434 show that the leading question presented *434 was one of title, and the fact that the determination of it may have depended on a question of boundary could not change the character of the vital issue of the case; for that was but a question of fact, to be considered, like any other fact, in determining whether the issue of title to the land should be decided in favor of one party or the other. Freeman v. McAninch, 87 Tex. 135, 27 S.W. 97. It is not competent to show by evidence *aliunde* that the main issue clearly made by the pleadings of the parties was not decided, for such testimony would contradict the judgment, which shows that it was. Rackley v. Fowlkes, 89 Tex. 613, 36 S.W. 77."

5 Findings of fact are no part of a court's judgment. They are required to be made for the purpose of an appeal. They serve the useful purpose of disclosing on appeal the reasons upon which the trial court based its judgment. In a collateral proceeding they can not be used for the purpose of showing an erroneous judgment, as such a judgment can only be assailed in a direct proceeding.

6 No different result would be reached even if the findings of fact and conclusions of law filed by the trial court should be given consideration. The judgment adjudicated the issue of title presented by the pleadings. If the findings of fact are considered and they be inconsistent with or contradictory of that judgment, this fact would not render the judgment void and subject to collateral attack. Under such circumstances it would be merely an erroneous judgment subject to correction through appeal.

The rule on this subject is thus stated by Mr. FREEMAN in his work on Judgments, (5th ed.) p. 1483, wherein he states:

"Findings contrary to the judgment are not conclusive as to the matter found. On the other hand, a judgment, although contrary to the findings is conclusive as to the matter adjudicated."

Ruling Case Law, Vol. 15, p. 862, Sec. 336, announces the rule in this respect as follows:

"An inconsistency between the findings and the judgment rendered by a court of competent jurisdiction will not subject such judgment to collateral attack."

11 Texas Jurisprudence, p. 713, Sec. 9, lays down the rule in this respect as follows:

"Jurisdiction, it is agreed, includes the power to determine either rightfully or wrongfully, it can make no difference how erroneous the decision
435 may be; if the court has jurisdiction *435 of the parties and subject matter its determination of the controversy is not void."

The late case of Stark v. Hardy, decided by Section A of the Commission of Appeals, 29 S.W.2d 967, was an action of trespass to try title. The judgment entry showed the notation "Plaintiffs take a nonsuit." The judgment entry on the minutes of the court, however, adjudicated that the plaintiffs take nothing by their suit, and that the defendants go hence without day and recover their costs. In construing this judgment the Commission held that the judgment entry could not be used to contradict and render void the judgment rendered in the case. In passing on the question the Court said:

"Even though it should be conceded that the fact recitals contained in the judgment entry show, of themselves that the court rendered an erroneous judgment, still they do not show that the judgment is void."

A party in whose favor a judgment has been rendered can not be deprived of the binding force of such judgment by independent findings filed by the trial court. As said by the Court in Sheffield v. Goff, 65 Tex. 358:

"A party is bound by the judgment, but not the logic of courts. He is not forced to complain of a decree that satisfies him, because he knows that it has resulted from premises not involved, not proved or not true."

To hold otherwise would result in nullifying a judgment in a party's favor because of erroneous conclusions of the trial court when the party in whose favor the judgment was rendered would be powerless to have them set aside. He could not appeal from a judgment in his favor, and when he sought to obtain the benefit of the judgment in subsequent litigation upon the same subject matter, he might find its effect limited or completely nullified by findings which he was denied any opportunity to have reviewed by the appellate court. In this connection the language of Judge PLEASANTS in the case of Word v. Colley, 173 S.W. 629, is very apt. He there says:

"From this statement of the issues in the former suit, the conclusions of fact and law filed by the trial judge and the judgment rendered it is clear that the conclusion that Horace Word and his sister had no reason to understand that they were accepting the lands conveyed to them by their father in settlement of their interest in their mother's part of the community estate, and that

they were not estopped by accepting said lands from asserting claim to their mother's portion of
436 *436 said estate, was not material to the adjudication actually made in said suit. These were not essential to be determined in order to render judgment for defendants, and they did not enter into nor become a part of the judgment rendered. *It is the judgment, and not the verdict or the conclusions of fact, filed by a trial court which constitutes the estoppel, and a finding of fact by a jury or a court which does not become the basis or one of the grounds of the judgment rendered is not conclusive against either party to the suit.* [Italics ours.]

"In 2 Black on Judgments, page 609, the author states the rule of estoppel by judgment as follows:

" 'The force of the estoppel resides in the judgment. It is not the finding of the court or the verdict of the jury rendered in an action which concludes the parties in subsequent litigation, but the judgment entered thereon.'

"The fact that the judgment in the suit in Cherokee County was in favor of defendants precluded them from bringing in review the findings of the judge, and we can not believe that a party can be estopped by a judgment in his favor from denying findings of the court rendering said judgment, the decision of which was not essential or material to the rendition of the judgment. Philipowski v. Spencer, 63 Tex. 607; Sheffield v. Goff, 65 Tex. 358; Manning v. Green, 56 Texas Civ. App. 579[56 Tex. Civ. App. 579], 121 S.W. 725; Whitney v. Bayer, 101 Michigan 151, 59 N.W. 415; Cauhape v. Parke, Davis Company, 121 N.Y. 152, 24 N.E. 186; 23 Cyc. 1227-1228."

Defendants in error complain that Monroe's petition in Cause No. 854 was insufficient to sustain the judgment rendered in favor of Hickox for the reason that the field notes of the land sued for are merely those contained in the patent and that the land could not, from such description, be located upon the ground.

7 We think the description given in Monroe's petition was clearly sufficient to admit proof as to the identity of the particular land sued for. The description of the land in the petition calls for stakes and mounds for corners. Such calls are for artificial objects. "Where a stake is once placed," says our Supreme Court in Thatcher v. Matthews, 101 Tex. 122, 105 S.W. 317, "it fixes the corner as conclusively as if marked by natural objects. Owing to the fact that it may be removed or obliterated, its location may be more difficult of proof; but, if proved, it fixes the corner with the same certainty as where it is marked by a permanent object.

437 "* * * *437

"The Court of Civil Appeals seem to have treated the case as if the call had been 13,400 to a corner without mentioning a stake. If such had been the case, their ruling would probably have been sound; but a stake is an artificial object, and its mention can not be disregarded. If the place where it was originally located can be established, the call for distance should yield to it."

The principle of law laid down in the above case was followed in the case of Wm. Rice Institute, etc. v. Gieseke, 154 S.W. 612, in which it was held that a call for distance must yield to a call for a stake, even though it could not be found if there was evidence offered as to its proper location. In discussing the question the Court said:

"In Thatcher v. Matthews, 101 Tex. 122, 105 S.W. 317, it is definitely decided: (a) In case of conflict a call for an artificial object will control course and distance. (b) A stake is an artificial object; and if the place where it was originally located can be established the call for distance should yield to it.

"The stake at the southwest corner and the stake and mound at its northwest corner, as called for in the field notes of the Bunker could not be found; but there is ample evidence to support a finding that they were located 1,849 varas west of the

Brock, and, under the authority quoted, such location being established the call for distance must yield to it."

A description in the petition of an action of trespass to try title very similar to Monroe's petition was held sufficient to sustain a judgment for the plaintiff in Porch v. Rooney, 275 S.W. 494. The description held by the Court to be sufficient was as follows:

"58-7/10 acres out of the S.E. end of the 229-7/10 acres, beginning at a stake marked in the South corner of the W. E. Thomas survey on the North line of Warren D.C. Hall league; thence south 45 degrees west 858 vrs. to the east corner of Thomas Greene survey, a stake in North marked W. D.C. Hall league; thence north 45 west along the north boundary line of Thomas G. Green one-third league to a stk and marked 1505 vrs.; thence north 45 east with the south line G. McDougal survey 858 vrs. to the west corner of W. E. Thomas survey stake, and marked in the prairie; thence south 45 degrees east, with said Thomas Greene line, 1505 vrs. to the place of beginning containing 228.7 acres."

8 Even if Monroe's petition in Cause No. 854 were deficient in the respect pointed out, the subject matter embraced in the *438 petition was within the jurisdiction of the court; hence, the judgment would be immune from collateral attack.

The rule on this subject is announced by Corpus Juris, Vol. 34, p. 560, as follows:

"A judgment can not be impeached collaterally on account of any defects in the pleadings which are amendable, even though such pleadings are bad on general demurrer. Thus the validity of a judgment can not be impugned by showing that a wrong form of action was chosen, or that the complaint did not state facts sufficient to constitute a cause of action, if it contained sufficient matter to challenge the attention of the court as to its merits."

The same author, Volume 15, 797, Sec. 94, further says:

"Jurisdiction of a particular action is acquired by the filing of pleadings which show the case to be within the general class of cases which the court has jurisdiction to hear and determine and a petition or complaint which shows this is sufficient to give jurisdiction, although it is defective in other respects."

In Moore v. Perry, 13 Texas Civ. App. 204[13 Tex. Civ. App. 204], 35 S.W. 838, the rule is thus stated:

"The judgment is the final act of the court, and where a court has jurisdiction of the subject matter, and renders a judgment, its validity will depend neither on the regularity of the process, nor the sufficiency of the pleadings."

In Conner v. McAfee, 214 S.W. 646, in which a writ of error was denied by the Supreme Court, the Court said:

"In an exhaustive note to the case of Jarrell v. Laurel Coal Land Co., reported in L. R. A. 1916E (316), the question of a collateral attack upon a judgment because of the insufficiency of the pleadings is fully discussed, and a multitude of cases from practically every State in the Union is cited, holding that such attack can not be sustained, and that, even though the judgment should grant more relief than is demanded, it is not void."

Finally, our Supreme Court in Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063, laid down the same rule. Chief Justice CURETON, speaking for the Court on this subject, said:

"Regardless of the question as to whether the original petition was sufficient in all respects against demurrer, its subject matter was within the jurisdiction of the district court of Johnson County, and that court, by filing of the petition, acquired jurisdiction of the suit." *439

9 Giving the fullest consideration to the findings of fact and conclusions of law made by the trial court in Cause No. 854, we can not say that the issue presented was solely one of boundary. Hickox owned an equitable title to Section 34. Monroe in his petition asserted a right to the title and possession of Section 103. The issue thus presented was not one simply of boundary. Under a similar state of facts it was determined by our Supreme Court, in Cox v. Finks, 91 Tex. 318, 43 S.W. 1, that the question involved was not purely one of boundary. In that case, as in the case of Monroe v. Hickox, it appeared that there were two grants, one owned by one party to the suit and the other claimed by both. It was decided that such a case did not constitute a boundary case within the meaning of the statute. In passing on this question the Court observed:

"There may be a question of boundary as to two grants, *one owned by one party to the suit and the other claimed by both.* A suit by one to try the title to the survey in controversy may involve a question as to the boundary between that and the other. This would not in our opinion be a boundary case within the meaning of the statute." (Italics ours.)

10 There is no merit in the contention of defendants in error that the judgment in Cause No. 854, Monroe v. Hickox, was not admissible against them because they were strangers thereto. The judgment in said cause that plaintiff take nothing operated to divest whatever title John Monroe had in said land at that time, and to vest the same in Hickox. This judgment constituted a muniment in Hickox' title, and was available for the purpose of establishing title to those holding under Hickox, even against the claim of strangers. McCamant v. Roberts, 66 Tex. 260, 1 S.W. 260; Owens v. New York Texas Land Co., 45 S.W. 601; Vol. 15, Encyc. Digest of Texas Reports, p. 124.

It is earnestly insisted by defendants in error that plaintiff in error was properly denied a recovery of the land sued for because it appears that Hickox, its predecessor in title, successfully maintained in Cause 854 that the patent by the State to Survey 103 was void by reason of the fact that the land described in such patent conflicted with the land described in senior surveys 34 and 35, and that under a well recognized principle of law the successor in title of Hickox should not be permitted to maintain the inconsistent position in this case that there is no conflict on the ground between Survey 103 and the senior surveys 34 and
440 35. *440

The doctrine of judicial estoppel thus invoked is one which operates to prevent a party who has successfully interposed in defense to an action or proceeding shifting his ground and taking a position in another action or proceeding which is so inconsistent with his former defense as necessarily to disprove its truth.

We do not question the soundness of the legal proposition thus asserted by defendants in error. We are unable, however, to agree with the assumption that the record shows that Hickox, in Cause No. 854, successfully maintained the position that Survey 103 was void because in conflict with senior Surveys 34 and 35. It is difficult to perceive upon what theory it can be contended that the trial court in Cause No. 854 determined the existence of a conflict between Survey 103 and Survey 34, when that court expressly found that it was "unable from the testimony and evidence to ascertain the true location on the ground of Surveys 103, 104, 34, and 35." It was impossible for the trial court to have found a conflict between these surveys unless there was sufficient evidence from which it could establish and definitely fix the location of each of such surveys upon the ground. It is obvious that the judgment in favor of Hickox was not the result of a finding by the trial court of a conflict between Survey 103 and Survey 34, but solely because of the failure of Monroe to discharge the burden imposed upon him by law to adduce sufficient proof from which the trial court could definitely locate upon the ground the

position of the land sued for. It is therefore clear that Hickox, in Cause No. 854, did not successfully maintain the position of a conflict between Survey 103 and Surveys 34 and 35.

Aside from this, the assumption made by defendants in error that Hickox assumed an inconsistent position with that taken by the plaintiff in error in this case is not justified by anything appearing in the record. Defendants in error claim that their assumption as to Hickox' position in Cause No. 854 is sustained by the following state of facts shown by the record, viz.: First, that title to Survey 103 could not have been adjudicated a limitation title in Hickox' favor because he made no plea of limitation. Second, because in said cause there were filed abstracts of title, and it will be presumed that they were filed in obedience to a statutory demand; that the abstract of title filed by Monroe to Survey 103 shows a regular chain of conveyances from the original patentee to Monroe, and that the only abstract of title filed by Hickox is merely an award and sale by the State of Texas to him of Survey 34.

From these premises it is assumed that no title papers not included in the abstract of title were or
441 could have been offered *441 in evidence or considered in determining the case. Based upon this state of facts, the assumption is made that Hickox took the position upon the trial of Cause No. 854, and successfully maintained it, that the land described in the field notes of Survey 103 was actually included within the boundaries of Survey 34. An inspection of the record does not reveal any demand by either party for the filing by the other of an abstract of title in Cause No. 854. It does not show that either party to that suit filed or purported to file an abstract of the title upon which he expected to rely on the trial of the case. What is mistakenly assumed to be an abstract of title is merely the giving of the statutory notice required as a predicate for the introduction of certified copies of instruments which the parties desired to introduce upon the trial of this cause.

The notice given by Monroe was addressed to Hickox or his attorneys of record, and reads as follows:

"You will hereby take notice that I have filed with the district clerk of Pecos County, Texas, to use as evidence in the above styled and numbered cause the following title papers, viz.:" (Then follows a recital of various instruments constituting Monroe's chain of title.)

The notice given by Hickox is addressed to Monroe or his attorney of record and is as follows:

"You are hereby notified that I have filed with the district clerk of Pecos County, Texas, to be used as evidence in the above styled and numbered cause the following title papers: Certified copy of application of Hickox to purchase Section 34, Block 194, G. C. S. F. Ry. Co. for 640, together with application attached and endorsement and award by the Commissioner of the General Land Office made thereon."

It is apparent from an inspection of the above quoted documents filed by the parties that neither party was purporting to file an abstract of title in response to a statutory demand therefor. By giving the above notice the right of neither party was foreclosed from offering any legitimate and admissible evidence to establish title to the land in controversy, as would have been the case had they filed, in obedience to a statutory demand, an abstract of the title upon which they relied.

11 Even if it be conceded that Hickox, in the suit filed against him by Monroe, assumed and successfully maintained the position that there was a conflict between Surveys 103 and 34, still, since plaintiff in error was not a party to that suit, it
442 would *442 not be prevented from defending the title acquired under Hickox upon any available ground.

It is well established that a position assumed by a party in a former judicial proceeding will not estop him, or privies in estate, from taking an inconsistent position in a new proceeding unless

the new action is between the same parties. The rule is thus stated by the author of Corpus Juris, Vol. 21, p. 1229, Sec. 233:

"In order to work an estoppel, the position assumed in the former trial must have been successfully maintained. In a proceeding terminating in a judgment, the position must be clearly inconsistent, *the parties must be the same,* and the same questions must be involved."

Ruling Case Law, Vol. 10, p. 702, gives this statement of the rule:

"It may be laid down as a general rule that a party will not be allowed in a subsequent judicial proceeding to take a position in conflict with a position taken by him in a former judicial proceeding, where the later position is to the prejudice of the adverse party, and the parties and the question are the same * * *. But, *ex vi termini,* the rule underlying these propositions does not apply to suits in which the issues and the parties are not the same, nor to a position not precisely that taken on the prior proceedings."

In Heard v. Vineyard, 212 S.W. 489, the rule as above defined was applied by the Commission of Appeals, as is revealed by the following quotation from the opinion:

"Defendants stress the proposition that the Vineyards, having recovered in the Brundrett case [17 Texas Civ. App. 147[17 Tex. Civ. App. 147], 42 S.W. 232] upon the theory that James B. Wells, Sr., and consequently Brundrett, never had title to the 11/24 interest therein, and herein involved, are estopped to urge in this case the entirely contrary theory that Wells did have a title which passed to Brundrett through the executor's sale and vested in Lillian Vineyard through her judgment against Brundrett. *Such an estoppel can only be urged in favor of the parties to that suit.* Defendants not being parties to the suit of Vineyard v. Brundrett, plaintiffs are in no manner estopped to assert another and contrary theory upon which to base a recovery, which in this case is but an adoption of defendants' theory."

The reason for this rule is apparent. If a party has assumed a certain position and procured a 443 judgment in his favor which *443 vests title in him to the land involved, he has in law a good title thereto. Since he has such a title, it naturally follows that he may convey a good title to one purchasing from him.

If Hickox took the position assumed in Cause No. 854, and thereby obtained judgment, the effect of which was to vest the title to Survey 103 in him, then there was no infirmity in his title. Presumptively, the final judgment in his favor was correct. Since this is true, no valid reason exists why he could not convey to another a good and indefeasible title to the premises. It is true that if Hickox himself were seeking to maintain this suit, he would be estopped from asserting any position inconsistent with that which he maintained when he obtained judgment in the former proceeding. But, the plaintiff in this case has taken no inconsistent position in regard to the title to this land. It has bought and paid for the land upon the assumption that the judgment in said former proceeding operated to divest title out of Monroe and vest the same in Hickox. It therefore can not be barred from asserting any defense of its title that it may see fit to urge, even though its predecessor in title may have maintained an entirely different position in acquiring the same. Plaintiff in error's right to urge any defense of the title to said land that it may see fit can not be abridged because of a position taken by a predecessor in title in a suit to which it was not a party and for which it is in no wise responsible.

12 It appears that the judgment rendered in Cause No. 854, Monroe v. Hickox, was recorded in the minutes of the district court, but that the same was not recorded in any record required to be kept by the county clerk. At the time this judgment was rendered Pecos County had less than 8,000

inhabitants. Under the provisions of our Constitution, a single clerk was required to serve as both district and county clerk.

Certain of the defendants in error claim to be bona fide purchasers for value without notice of the rendition of the judgment in Cause No. 854. It is their contention that under the statute (Art. 6638, R. S. 1925) plaintiff in error was not entitled to introduce said judgment in evidence until it had adduced proof showing a compliance with the statute requiring the same to be recorded in the office of the county clerk.

Plaintiff in error insists that where there is but one office and one officer, that a record of the judgment in the minutes of the district court would be a substantial compliance with the terms of the statute. We are unable to agree with this contention. While there was but one officer, he was required to discharge the duties incumbent
444 upon both district and county *444 clerks. As such officer he was necessarily required to keep two different sets of records, one which the law required to be kept by district clerks and the other which was required to be kept by county clerks. The judgment in question was not recorded in the office of the county clerk as required by the statutes unless it was incorporated in some record kept by this officer in the performance of the duties imposed upon a county clerk.

13 It has been held that the statute in question is a registration statute and that its enactment was for the purpose of giving notice to intending purchasers. Russell v. Farquhar, 55 Tex. 355; Henderson v. Lindley, 75 Tex. 189, 12 S.W. 979. Since this is true, the burden rested upon the defendants in error, under their claim of bona fide purchasers without notice of the rendition of the judgment in Cause No. 854, to show that they acquired the land for value and without notice, either actual or constructive, of the rendition of said judgment.

14 Plaintiff in error introduced evidence tending to show that Hickox was in actual possession of this land from 1911 to 1915, and that such possession continued through his tenant, I. G. Yates, from the latter date until the time he was ousted from possession by the defendants in error. If it should be found upon another trial that Hickox was in actual possession of said land, either in person or by tenant at the time defendants in error acquired their rights in said land, such possession would be sufficient to constitute constructive notice to them of Hickox' claim to said land. Watkins v. Edwards, 23 Tex. 449; Glendenning v. Bell, 70 Tex. 632, 8 S.W. 324; Flannagan v. Pearson, 61 Tex. 304; Cobb v. Robertson, 99 Tex. 145, 86 S.W. 746, 87 S.W. 1148; Forrest v. Durnell, 86 Tex. 650, 26 S.W. 481; Boffa v. Hebert, 42 S.W.2d 624.

15 At the time of John Monroe's death the judgment which we have held vested title in Survey 103 in Hickox had not been recorded in the office of the county clerk of Pecos County. At said time Monroe was therefore the apparent record owner of this land. He left a will which was duly probated in the county where the land was situated. The will devised all of the estate of which he died seized and possessed to his widow, and named her as independent executrix. After qualifying as such she filed what purported to be a complete inventory of all the property belonging to said estate. This inventory did not list Sections 103 and 104, the title to which was involved in said Cause No. 854.

It is plaintiff in error's view that the omission of Survey 103 from the inventory prepared and filed
445 by Mrs. Monroe, independent *445 executrix of the estate of John Monroe, was sufficient to put purchasers from her upon inquiry as to whether title to the omitted survey had passed out of John Monroe prior to his death. We are not in accord with this view. We do not think that purchasers from Mrs. Monroe were required to examine the inventory filed in connection with the probate of Monroe's will. The record showed the apparent title to the land involved in Monroe at the time of

his death. The will purported to vest the title to all the property owned by Monroe at the time of his death in his widow. The record of this will was sufficient to complete the apparent title to the land involved in Mrs. Monroe; hence, it was not necessary for an intending purchaser to investigate further than to examine the link necessary to perfect an apparent title in Mrs. Monroe.

Plaintiff in error insists that Monroe did not die seized and possessed of this land, and therefore it did not pass under his will to his widow. Of course this is true. If the real title had passed by the will, plaintiff in error would have no claim to this land. So far as the record to which a purchaser was required to look, however, the apparent legal title was vested in Monroe's widow by the provisions of his will.

16 We conclude, however, that upon the issue as to whether defendants in error were bona fide purchasers for value of the apparent legal title of the land involved without notice of the fact that title to said land had been divested out of Monroe and vested in Hickox by the judgment in Cause No. 854, it would be permissible for plaintiffs in error to show that any of the defendants in error at the time they acquired title through Mrs. Smith had actual notice of the omission of Survey 103 from the inventory filed by Mrs. Monroe. Such fact would be a circumstance which might properly be considered by the jury in passing upon the question as to whether defendants in error were put upon inquiry as to whether Monroe in fact owned said land at the time of his death.

Plaintiff in error presents a number of assignments complaining of the admission and exclusion of evidence by the trial court. To discuss these assignments seriatim would prolong an already unduly lengthy opinion. We deem it sufficient to say that these assignments have been given careful consideration and the conclusion reached that the trial court committed no error in the rulings complained of.

Because of the errors of the trial court in striking out the judgment in Cause No. 854, in admitting the findings of fact and conclusions of law, and in giving a peremptory instruction, the judgment must be reversed. *446

We therefore recommend that the judgments of the Court of Civil Appeals and of the trial court be both reversed and the cause remanded for another trial.

Adopted by the Supreme Court June 19, 1934.

ON MOTIONS FOR REHEARING.

MR. SPECIAL JUSTICE FOUTS delivered the opinion of the Court.

This case was decided by the opinion (supra) appearing in 73 S.W.2d 490. Motions for rehearing were duly filed. Before action was taken on these motions the personnel of the Court was changed, Associate Justice SHARP succeeding Judge GREENWOOD, and Associate Justice CRITZ replacing Judge PIERSON, deceased. Judge CRITZ certified his disqualification, resulting in the appointment of ELWOOD FOUTS, of Houston, Texas, as Special Associate Justice, who duly qualified. The Court as thus composed requested oral argument on the motions due to the fact that Chief Justice CURETON alone heard argument as a member of the Court when the case was originally disposed of. The questions decided by this opinion on the motions for rehearing embrace only a portion of those discussed and disposed of by the former opinion which is overruled where it does not conform to the law as here announced and as thus modified stands approved.

The parties will be designated here as they were in the trial court. Briefly summarized the facts are:

This suit was filed June 21, 1928, by Permian Oil Company against the defendants, seeking to recover the land described and the value of the oil produced therefrom. Plaintiff established title in John Monroe and then offered in evidence the

pleadings and judgment rendered in Cause No. 854, John Monroe v. T. F. Hickox, in the district court of Pecos County, Texas. That suit was filed August 22, 1910, and disposed of March 4, 1911, by a take nothing judgment entered against the plaintiff. The petition there was in statutory form of trespass to try title describing Sections 103 and 104, Texas Central Railway, as the land sued for. The answer was a plea of not guilty. The present suit involves said Section 103. Apparently some of the defendants claim title under John Monroe. There was filed in the former case the court's findings of fact and conclusions of law. Plaintiff, which holds under Hickox, asserts that it has Monroe's title by virtue of the former judgment.
447 *447 It is evident from the record that some of the defendants herein claim to have acquired their several titles at a time when that judgment was not properly recorded, as required by statute. Plaintiff made no proof that such defendants were not bona fide purchasers for value or that they bought with notice. The judgment in Monroe v. Hickox and its supporting pleadings was admitted in evidence over the objection of defendants on the ground that such proof was not made and on the further ground that the judgment was either void on the face of the record or else if properly construed did not dispose of the issue of title. Defendants renewed their objections in a motion to strike the evidence, in which they prevailed after they themselves offered in evidence, over the objection of the plaintiff, the entire record out of which emanated the judgment of Monroe v. Hickox. Their motion resulted in a peremptory instruction against the plaintiff.

Objection was made by the plaintiff that the court's findings of fact and conclusions of law in Monroe v. Hickox were not a part of the judgment record. We do not agree with this contention.

17 The phrases "judgment roll," "judgment record" and "face of the record" are terms used interchangeably in our decisions. They grow out of the common law where in the earliest cases an officer of courts of record preserved on a scroll of parchment a record of the issues which the contestants agreed to litigate. At that time their pleadings were oral. This roll later embraced the written pleadings, the court's charge to the jury, the jury's verdict, the court's final judgment and other similar matters constituting a part of the proceedings of the trial. One of the purposes of the roll was to enable the proper application of the rule of res adjudicata, the record being preserved among other reasons in order to show what issues had been disposed of and the parties to be bound thereby. When inquiry as to what constitutes this record arises it must be remembered that ordinarily one of the purposes of the inquiry is to properly apply the rule of res adjudicata. Every part of the trial proceedings preserved in courts of record under direction of the court for the purposes of its record constitutes the judgment roll.

The defendants offered the record of the former case for the purpose of establishing either that the judgment entered was void on the face of the record, or if not void, then construed in the light of the judgment roll actually disposed of only one issue, that of boundary, and therefore, they contend, did not operate as a muniment of title; or
448 that it constituted conclusive *448 evidence that the sole issue determined was that Sections 103 and 104, as between the parties and their privies, either could not be located on the ground or else were in total conflict with senior surveys 34 and 35, G. C. S. F. Ry. Co. Block 194, and because of which they contend that plaintiff, the successor in title of Hickox, is estopped to now maintain that Section 103 can be located on the ground free of conflict. These contentions are again strongly urged by the defendants in their motion for rehearing. Because of the doubts which were raised in the mind of the Court by the argument that these contentions were supported by fundamental law which had been lost sight of in too narrowly adhering to precedent, we have re-examined the whole field of law involved.

18 The principle of res adjudicata is founded in public policy and is as old as English jurisprudence. Fundamentally its purpose is to expedite justice by putting an end to litigation; and to preserve the sanctity of the judgments of the courts by making them immune from collateral attack. Once a court has exercised its functions of decision on an issue over which it has jurisdiction, and that decision becomes final, the parties thereto and their privies can not escape its binding effect. Lacking this anchorage of finality a judicial system would be little more than a rule of fiat.

It has been said that the rule finds its application in two classes of judgments issuing out of courts having jurisdiction. One class is encountered where in the first case, out of which the judgment issues, and in the second suit where the judgment is offered in bar, the parties are the same, the cause of action is the same, the capacity in which the parties act is the same, and the res or things disposed of are the same. Such a judgment if unambiguous, as a general rule is treated as an absolute bar to retrial of the same cause of action on the theory that it has been merged in the judgment. A judgment of this type usually permits of no inquiry into the balance of the record from which it emanates, except in the case of certain well recognized exceptions. Where such a judgment is ambiguous the judgment roll, and if necessary, extrinsic evidence, is admissible, not to contradict the judgment, but only to aid in its construction. The other type is encountered where the parties to a subsequent suit seek to relitigate an issue which was disposed of by final judgment in a former suit to which they were parties, although the cause of action may have involved other issues. In the latter instance it has been said the parties and their privies are estopped to try again such issue disposed of by the former judgment and
449 the entire record in the first case *449 is admissible in evidence in order to determine whether or not the issue involved in the second case was actually disposed of in the first, without reference to the question of ambiguity.

The cases as a matter of fact do not so completely separate themselves into two such sharply defined classifications but graduate from the one into the other, and hence the explanation for the use by courts of much very general and conflicting language. It must be borne in mind that the purpose of the law remains constant to prevent the failure of justice as the result of permitting the retrial between the same parties or their privies of a cause of action or of an issue which has been finally disposed of.

19 The judgment in Cause No. 854 unless affected by ambiguity leading to the construction sought by defendants clearly comes within the first classification. It is necessary, therefore, to ascertain whether that judgment is ambiguous. This involves a number of problems. We find no reason to hold it ambiguous simply because it is necessary to refer to the pleadings. It is true the description of the land and the nature of the cause of action do not appear in the face of the judgment. However, this is supplied by the direct reference to the plaintiff's pleadings appearing in the face of the judgment. Judgments are construed like other written instruments. "That is certain which may be made certain," and being certain, is unambiguous, whether it be a judgment or a writing of other description. By this reference in the judgment there is as effectively supplied the description of the land and the cause of action disposed of as though the judgment had recited both in its face. Freeman on Judgments, Sec. 97; Martin v. Teal, 29 S.W. 691; Ruby v. Von Valkenberg, 72 Tex. 459. The petition and the decree are set forth at the end of this opinion in a footnote.–

– Page 459.

1. The first amended original petition filed by John Monroe on February 28, 1911, in a statutory form of trespass to try title in said Cause No. 854; said amended petition being as follows:

"In the District Court of Pecos County, Texas, February Term A.D. 1911.

"John Monroe vs. T. F. Hickox, No. 854.

"To the Honorable District Court of Said County:

"Now comes John Monroe who resides in Pecos County, Texas, hereinafter called plaintiff, and leave of the Court having first been had and obtained, files this his first amended original petition and complains of T. F. Hickox, hereinafter styled defendant, and for cause of action, plaintiff represents to the Court that on or about the 21st day of April A.D. 1909, he was lawfully seized and possessed of the following described land and premises, situated in the County of Pecos, State of Texas, holding and claiming the same in fee simple, to-wit:

"1st.

"All of Section No. 104, Block 194, T. C. Ry. Co. original grantee, situated in Pecos County, Texas.

"2nd.

"All of Section No. 103, Block 194, T. C. Ry. Co. original grantee situated in Pecos County, Texas, described as follows:

"Beginning at a stake and mound at the N.E. Cor. of Sur. No. 102, Blk. 194, T.C. R. R. Co., Cert. 2302, for the N.W. Cor. of this survey.

"Thence east 1900 vrs. to a stake and mound for the N.E. Cor of this survey.

"Thence South 1209 vrs. to a stk. and md. for the S.E. Cor. of this survey.

"Thence West 1900 vrs. to a stk. and md for the S.W. cor. of this survey.

"Thence North 1209 vrs. to the place of beginning, and said Section No. 104, Block No. 194, T. C. Ry. Co. is described by metes and bounds as follows, to-wit:

"Beginning at a stake and mound at the N.E. Cor. of Survey No. 103, Block No. 194, for the N.W. Cor. of this survey.

"Thence East 1900 vrs. to stake and mound for N.E. Cor. of this survey.

"Thence South 1209 vrs. to stake and mound for S.E. Cor. of this survey; thence West 1900 vrs. to stake and mound for S.W. Cor. of this survey; thence North 1209 vrs. to the place of beginning.

"That on the day and year last aforesaid, defendant unlawfully entered upon the premises and ejected plaintiff therefrom and unlawfully, withholds from him the possession thereof to his damage in the sum of $2,000.00. That the reasonable rental value of said land and premises is $100.00 per annum; that on the date that defendant entered upon plaintiff's said land, plaintiff had on same a wire fence composed of wire nailed on the posts set in the ground, that defendant has, since said date, broke, tore down and destroyed plaintiff's said fence and the posts and wire composing the same, to the plaintiff's damage in the sum of $100.00.

"Therefore, plaintiff prays judgment of the court that inasmuch as the defendant has been duly cited to appear and answer this petition, that plaintiff have judgment for the title and possession of said lands and premises above described, and that writ of restitution issue, and for his rents, damages and costs of this suit, and for such other relief, special and general, in law and in equity that he may be justly entitled to, etc."

2. The judgment rendered and entered in the minutes of the district court of Pecos County in said Cause No. 854, as follows:

"In the District Court of Pecos County, Texas. Feb. Term 1911.

"John Monroe vs. T. F. Hickox. No. 854.

"On the 28th day of February A.D. 1911, came on to be heard the above numbered and entitled cause in its regular order on the docket, and thereupon came the the plaintiff in person and by attorney, and also came the defendant in person and by attorney, and all parties announced ready for trial, and no jury having been demanded and all issues of law and fact being submitted to the court, the pleadings were thereupon read, the evidence introduced and argument of counsel made,

> and the court after hearing same, thereafter on the 4th day of March A.D. 1911, in open court pronounced judgment in favor of the defendant. It is therefore ordered, adjudged and decreed by the court that the plaintiff John Monroe take nothing by his suit against the defendant T. F. Hickox, and that the defendant T. F. Hickox, go hence without day and recover against the plaintiff John Monroe all costs of suit, for which execution will issue. To which judgment of the court the plaintiff John Monroe in open court excepted and gave notice of appeal to the Court of Civil Appeals of the 4th Supreme Judicial District of Texas, sitting at San Antonio, Texas, and upon plaintiff's request and good cause being shown he is hereby given sixty days after the adjournment of this court within which to file his statement of facts herein."

But the defendants nevertheless contend that even after referring to the pleadings it is impossible to know what the judgment decided, and thus being ambiguous it is proper to consult the judgment record from which it appears that the sole issue determined by the court was an issue of boundary and that, being only a boundary suit, the judgment is void and falls because the description is insufficient; citing the requirements of Article 7366, and the decisions of this Court to the effect that judgments in boundary suits involving descriptions similar to the one used here, are ineffectual because nothing has been decided. Inherent in these contentions is the conception that different causes of actions are involved in boundary suits and other trespass to try title suits.

450 *450

We are mindful that in a number of early decisions by a divided court, judgments in boundary suits brought in form of trespass to try title were held to be final notwithstanding the statutory right then existing by which plaintiffs in trespass to try title were permitted to bring a second suit. But while these holdings appeared to be on the theory of res adjudicata they may be in part accounted for by recognizing that they also involved the construction of a statute, the Court ascertaining from the record that title as that term was employed in the then existing statute was not an issue in those cases. There are also cases, construing the former statute making judgments in boundary cases final in courts of civil appeals, from which it might be inferred that the cause of action in a boundary case in the usual form of trespass to try title differs from that in other trespass to try title cases. Without reviewing these cases it may be said that they were undoubtedly influenced by the fact that they were construing the effect of the statute. We are unwilling to accept cases of either class as authority for the proposition that different causes of action are involved in trespass to try title suits brought in statutory form one of which turns on the fact of boundary and the other of which turns on some other evidentiary fact affecting title.

20, 21 Measured by the familiar rule Cause No. 854 as tried was a boundary suit. On appeal it would have been judged as such because the record shows there would have been no suit but for the question of boundaries. Expressions from boundary cases on appeal indicating judgments to be void because the testimony shows a description, apparently sufficient, actually to be insufficient to locate the land on the ground, can not be invoked on collateral attack to nullify a judgment in trespass to try title where the description on its face is sufficient. Such decisions are dealing with voidable, not void, judgments. But this is not an appeal of the case of Monroe v. Hickox, No. 854. The question here is one of res adjudicata: Does the judgment in Cause No. 854 dispose of the title to the land in question so that the parties and their privies are bound thereby? Under decisions of this Court founded on our present trespass to try title statutes the contention now made constitutes a collateral attack on the judgment and under the general rule must be judged by the pleadings and judgment alone,

unless the judgment because of ambiguity is limited by the judgment roll. Aside from the claim of ambiguity the judgment in Cause No. 854 as it stands is not void because of insufficient description: the description used in the petition in that case was sufficient under the requirements of
451 Article 7366, as was pointed out *451 in the original opinion. The fact that on the trial boundary was the sole controversy controlling title does not keep the former judgment, which disposed of title, from binding the parties and their privies. In trespass to try title determination of the outcome of the suit through the fact of boundary does not alter the cause of action plead and disposed of by the judgment. In Monroe v. Hickox the cause of action was the title to the land described. These conclusions follow from recognized principles as is pointed out in the well reasoned opinion in Freeman v. McAninch, where it was decided that a judgment in a boundary suit brought in form of trespass to try title, although disposed of on the fact of boundary, nevertheless was res adjudicata of the issue of title. There the pleadings were in statutory form of trespass to try title.

"An issue is the question in dispute between the parties to an action, and, in the courts of this State, that is required to be presented by proper pleadings." * * * "Thus were the issues presented, and the leading issue was one of title; and the fact that the determination of that may have depended on a question of boundary could not change the character of the vital issue in the case, for that was but a question of fact, to be considered like any other fact in determining whether the issue of title to the land should be decided in favor of the one party or the other." * * * "The issue presented by the pleadings, and determined by the judgment, was one of title; and that * * * this depended on the fact of true locality of the boundary between the surveys, could not change the character of that issue." Freeman v. McAninch, 87 Tex. 132, 27 S.W. 97.

The judgment in Monroe v. Hickox is not void unless construction made necessary because of ambiguity discloses some fatal deficiency.

Returning to the question of ambiguity and the contention that the effect of the judgment in Cause No. 854, because it is claimed to be ambiguous, should be limited to the issue or issues actually tried, as disclosed by the findings of fact and conclusions of law, and the further contention that plaintiff is estopped while claiming the benefits of that judgment to now show a total absence of conflict and a present ability to locate the land on the ground, it may be said that were these original questions their answer would be more difficult. It is true, as pointed out by some of the defendants, that in every decision from French v. Olive, 67 Tex. 400, 3 S.W. 568, down to that announced in this case in the original opinion by the Commission of Appeals, title itself was actually
452 the issue tried. It is *452 true that nowhere has this Court directly announced that in trespass to try title where the cause of action was properly limited to some issue less than title itself plaintiff nevertheless lost his title under a take nothing judgment and the defendant gained it. It is true that in many of the other states where statutes similar to our trespass to try title statutes prevail, and where the statutory provision similar to that embraced in Article 7391 exists, the general rule seems to be that the defendant in a take nothing judgment does not gain or become vested by presumption with the plaintiff's title. On the trial he must establish facts entitling him to acquire the plaintiff's title by virtue of the judgment. Indeed the United States Supreme Court in Barrows v. Kindred, 71 U.S. 399, 18 L.Ed. 383, construing the Illinois statute, which resembles our Article 7391, after commenting on the absence of construction by the State courts, said:

"Where a plaintiff shows no title and is therefore defeated, it is not easy to perceive how any title can be said to have been established in the action or how, under the statute, the result can affect his right to bring a new action for the same premises."

By the rule thus announced a losing plaintiff in a take nothing judgment would not be foreclosed from bringing a second suit if title itself were not affirmatively established in defendant in the first suit. Under such reasoning every take nothing judgment in trespass to try title would be ambiguous because it would be impossible to know whether it operated as a dismissal or as an adjudication of title, or an adjudication of some right incident to title. Therefore the record could rightly be employed to construe and limit it to the actual issue tried, and if the effect of the take nothing judgment was equivalent to a dismissal, that effect would permit the bringing of another suit by the losing plaintiff.

22 But here we are confronted with Article 7391 and its construction by this Court. That article reads:

"Any final judgment rendered in any action for the recovery of real estate shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all persons claiming from, through or under such party, by title arising after the commencement of such action."

When Judge GAINES in French v. Olive announced the rule that the effect of a take nothing judgment in trespass to try title was to hold that
453 the defendant had the better title, his *453 opinion, and the long line of decisions by this Court following it, necessarily operated to construe Article 7391 and the judgment together and in effect announced the rule to be: that when the plaintiff failed for any reason, whether it be due to conflict with a senior survey, outstanding title in a third party, or other lack of title in himself, the judgment left the defendant in possession of the premises; and that such possession imported title; and that title was thereby established in the defendant.

23 The party in possession of land is considered to be the owner until the contrary is proved. His possession imports that he holds a title thereto. As was said in Linthicum v. March, 37 Tex. 349: "This has been the repeated language of this Court since Hugh v. Lane, 6 Tex. 292, in which it is said: 'The possession of the defendant gave him a right against the plaintiff until he showed sufficient title.' " Thus the contention that no title was established by the judgment in Cause No. 854 seems unsound. In this State it is elementary that no judgment can "establish" "title or right of possession" in a litigant in the absolute sense of finality against the world. The "title or right of possession established" is limited to the parties bound by the judgment.

In trespass to try title brought in statutory form the plaintiff asserts that he has the title and is entitled to the right of possession. The defendant by his plea of not guilty admits that he has possession and asserts that he possesses the better title. When the ordinary judgment is entered there can not remain outstanding in the losing party an opposing title. The decree announces that facts appeared on the trial which converged and combined in the winning party all of the rights of both plaintiff and defendant.

24 Had the pleadings in this case confined the parties to the issue of locating a boundary we possibly might face a different case. The cause of action which was asserted against the defendant by the plaintiff in the trespass to try title suit of Monroe v. Hickox, plead in general form, was the claim to the title and possession of the land described. The defendant's plea of not guilty admitted his possession and put in issue the plaintiff's cause of action. The plaintiff failed and the defendant prevailed. In such an instance both the title and the possession of defendant was established as between the parties by the judgment. In this State a petition limited to the satutory form of trespass to try title always puts in issue both title and possession. Any one of a
454 number of facts may determine the issue, *454 but the cause of action remains the same. If the plaintiff seeks to limit the issue to one of such facts, he must do so by special pleading in

appropriate form. By so doing he may limit the case to the portion of his land involved in the boundary dispute, or possession, or to some other incident of title.

25, 26 It plainly appears therefore that under construction long established by this Court the judgment in Cause No. 854 was unambiguous. Furthermore there was present in the judgment and the judgment roll no other feature which took the judgment out of the general rule. The judgment could not be contradicted by the record and being unambiguous neither was there anything in it to be interpreted or explained by the record. The judgment roll was properly admitted to test the validity of the judgment, but this only operated to show that the judgment was not void on the face of the record. Neither the rule of res adjudicata nor the rule of estoppel can be invoked to escape this conclusive effect. Instead these principles unite to establish this result. To hold otherwise would be to nullify the meaning of Article 7391 as long construed by this Court, and would overturn the long line of decisions to the effect that the plaintiff must recover on the strength of his own title and to the effect that possession imports title. Thus it has come about that the rule in this State is recognized to be that a judgment in trespass to try title that plaintiff take nothing by virtue of his suit operates as a muniment of title and adjudges in effect that facts were found to exist which between the parties established in the defendant all the title to the land, including, just as effectively as though it had passed by voluntary conveyance, such title as plaintiff had.

Defendants also contend the trial court properly instructed the jury to find for the defendants at the close of plaintiff's testimony because the judgment in Cause No. 854 was not recorded as required by Article 6638 Revised Civil Statutes. Defendants contend the burden was on plaintiff to prove notice or lack of consideration by defendants before the judgment was admissible. Plaintiff contends the burden was on defendants to prove themselves innocent purchasers without notice before they could receive the protection of that statute. We think that neither contention is correct.

Present Article 6638, enacted February 5, 1840, reads as follows:

"Every partition of land made without an order or decree of a court, and every judgment or decree by which the title to land is recovered shall be duly
455 recorded in the office of the *455 county clerk in which such land may lie; and until so recorded, such partition, judgment or decree shall not be received in evidence in support of any right claimed by virtue thereof."

The law of 1836 relative to registration of deeds which is quite similar provided:

"No Deed shall take effect as regards the interest and rights of third parties until the same shall have been duly proved and presented to the court as required by this Act for the recording of land titles."

This Act was amended February 5, 1840, (at the same time present Article 6638 was enacted) so as to make unrecorded conveyances void as against all subsequent purchasers who established that they had bought for value and without notice. Under the law of 1836 the burden was on the senior unrecorded deed holder to establish that the junior deed holder was not an innocent purchaser for value. Under the Act of 1840 this burden was shifted and the junior deed holder was required to show that he was an innocent purchaser.

The case of Kimball v. Houston Oil Company, 100 Tex. 336, 99 S.W. 85, opinion by Judge WILLIAMS, construed the Act of 1836 affecting the registration of deeds. The question involved was that of burden of proof, the holder of the junior deed contending that the burden was on the senior unrecorded deed holder to prove that the subsequent purchaser had knowledge of the prior deed. The Court held this contention to be correct.

Construing the language of the Act of 1836, in connection with the Act of 1840 which amended it, Judge WILLIAMS uses this language:

"We think it is true that under either statute the burden is upon one claiming against an unrecorded deed to produce evidence sufficient to bring himself within its protection; to show, in other words, that he is one to whom its language applies."

Continuing elsewhere, while recognizing that the Act of 1836 was a registration act and that the holder under the unrecorded senior deed could offer the deed in evidence in making out his prima facie case, he then says:

"When, against such a deed" (referring to the unrecorded senior deed), "is produced a subsequent one from the same grantor, apparently valid, is it not shown prima facie at least, that the claimant under it is a third party having a right or an interest to be affected by the prior conveyance, and is he not literally within the terms of the
456 statute and entitled to its protection?" *456

He answered by holding that the junior deed holder was then within the protection of that statute and that the burden shifted to the holder under the senior unrecorded deed to prove the junior deed holder was not an innocent purchaser.

The two statutes, the one applying to deeds, the other to judgments, are so similar in their wording as to make it appear that this reasoning applies with equal force in construing Article 6638, unless it is inhibited by previous decisions of this Court. The statute of 1836 concerning deeds provided that no unrecorded deed could affect the rights of third parties. The statute of 1840, present Article 6638, concerning judgments, provides that no rights can be established under an unrecorded judgment. To undertake to establish a right under an unrecorded deed would be the only way a person could affect the rights of third parties and to undertake to establish a right under an unrecorded judgment of necessity would adversely affect the rights of third parties, so that the language of each statute operates to announce the same rule which applies in the one instance to unrecorded deeds and in the other to unrecorded judgments.

Here as in Kimball v. Houston Oil Company it is plausibly argued by plaintiff that Article 6638 is only a registration statute designed to protect creditors and innocent purchasers and that properly interpreted the statute should be construed as our other registration statutes, to place the burden on the subsequent purchaser to establish that he bought for value without notice. It is true this court a number of times has held this to be a registration act and we later quote from some of those decisions. So had the Act of 1836 affecting deeds been held to be a registration act as was pointed out in Kimball v. Houston Oil Company, where Judge WILLIAMS quoted at length from Crosby v. Huston, 1 Tex. 203, and then said (referring to Chief Justice HEMPHILL'S opinion in that case):

"The Court therefore concluded that proof of the unrecorded instrument, other than the record, might be made; but also held that the 'letter of the statute will be departed from only "where the notice is so clearly proved as to make it fraudulent in the purchaser to take a conveyance in prejudice to the known title of the other party".' * * * We regard this as a decision of the question in this case, declaring the law to be that the holder of a junior deed taken while the Act of 1836 was in force is entitled to the protection of that act until his claim is shown to be fraudulent."

If the Legislature on February 5, 1840, by the statute covering judgments, had intended to place
457 the burden on the subsequent *457 purchaser to prove that he bought for a valuable consideration without notice, before he could receive the protection of Article 6638, it could have done so by using the same language employed by it on the same day when it amended the Act of 1836 affecting the registration of deeds, under which

amended act this burden was placed on the junior deed holder. Evidently it intended to avoid this by using language similar to that of the original Act of 1836 affecting deeds.

27 Article 6638 has been construed several times by this Court to be a registration statute and therefore not a rule of evidence precluding proof of an unrecorded judgment, just as the rule concerning the Act of 1836 covering unrecorded deeds was announced in Crosby v. Huston. The unrecorded deed under the Act of 1836 was admissible to enable the claimant thereunder to make out his prima facie case. But upon the introduction in evidence by the subsequent purchaser of a conveyance taken while the senior deed was off the record the burden then fell on the unrecorded deed holder to show notice or lack of consideration on the part of the junior deed holder.

Such we believe is also the rule under Article 6638.

Thornton v. Murray, 50 Tex. 161, seemed to go even further and hold as defendants contend. It is there stated:

"The evident object of this provision, * * * is not to prohibit the introduction in evidence of a decree or judgment of the class designated, under all circumstances, until recorded, but only to apply the system of registration to such a judgment or decree, and to deny to a party the right to so introduce it in evidence unless he shows its registration, or facts which make it, as between the parties and under the general provisions of the registration laws, admissible without registration."

Also in Russell v. Farquhar, 55 Tex. 355, it is said:

"* * * the statute properly construed did not require the registration of the former judgment to render it admissible in a subsequent suit for title and partition of the same land between the same parties."

But in Henderson v. Lindley, 75 Tex. 189, 12 S.W. 979, Judge GAINES demonstrated that the unrecorded judgment was admissible not alone against those who had notice but against all persons. However, he did not construe the statute so as to take away its protection. He only permitted the introduction in evidence of the judgment, which operated to make out a prima facie case. It was unnecessary for him to comment
458 on the burden *458 of proof which fell on the plaintiff when the defendant introduced evidence to show that he purchased when the judgment was off the record; the trial court in that case appears to have placed the entire burden of proof on the claimant under the unrecorded judgment. The protection of the statute comes to life when the opposing party offers a title acquired while the judgment was off the record. By doing so that party brings himself within the protection of the statute and the burden is then on the claimant under the unrecorded judgment to prove notice so clearly as to make it fraudulent in the subsequent purchaser to take a conveyance in opposition to the known title of the other party.

28 The judgment in Cause No. 854, Monroe v. Hickox, was improperly stricken from evidence by the trial court. While the burden of proof rested on the plaintiff to show that the defendants had notice of the judgment or were not bona fide purchasers for value, upon the introduction of evidence by them showing that they purchased from or under John Monroe at a time when the judgment was off the record, this burden had not arisen when the motion to strike the evidence was sustained, and the peremptory instruction against the plaintiff was entered. The defendants had not offered their title.

29 Running through this law suit we find the appeal for relief from the mistakes of a party to another suit or the errors of another trial court. But such relief could come here, as is always the case, only at the expense of the rights of many of those who have been "vigilant and careful." The fact that the record in this case now shows that Monroe

could have prevailed in his suit No. 854 if he had been sufficiently diligent does not weaken but only serves to emphasize the principles reaffirmed in this opinion.

"When a party passes by his opportunity, the law will not aid him. In Ewing v. McNairy, 20 Ohio St. 322, the judge says: 'By refusing to relieve parties against the consequence of their own neglect, it seeks to make them vigilant and careful. On any other principle, there would be no end to an action, and there would be an end to all vigilance and care in its preparation and trial.' " Freeman v. McAninch, supra.

The motions for rehearing are overruled.

Opinion delivered April 7, 1937.

Second motion for rehearing overruled May 17, 1937.

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MR. CHIEF JUSTICE CURETON dissenting.

For a statement of this case I refer generally to the opinion of the Court of Civil Appeals, 47 S.W.2d 500, and to the opinion of Special Associate Justice FOUTS on the motion for rehearing, (supra, 446) 107 S.W.2d 564. In this Court the case was originally heard by the Commission of Appeals, and the judgment recommended in the opinion of the Commission (73 S.W.2d 490) was entered by the Supreme Court. I was unable to agree to the correctness of that opinion and judgment, and so notified my then associates, reserving the right to file a dissenting opinion on motion for rehearing, after a more exhaustive examination of the questions involved. Argument was invited on this motion, as stated in the opinion of Special Associate Justice FOUTS. Upon the argument counsel were informed from the Bench that I had not approved the opinion previously rendered nor the decree entered thereon, but had withheld my final conclusion until the motion for rehearing came on for consideration. I could not approve the main conclusion of Special Associate Justice FOUTS, nor agree to the reversal of the case, but, being unable at the time to prepare an opinion expressing my views, I requested that a notation of my intention to do so later be appended to that opinion, and this was done. This duty I shall now attempt to perform. My views are well expressed in the opinion of the Court of Civil Appeals (47 S.W.2d 500), and I shall not elaborate on certain questions there discussed.

For the purpose of presenting the *locus* of this controversy I here reproduce a map taken from one of the arguments filed on behalf of defendants in error, which in turn was based on certain maps in evidence. The map is here presented only for the purpose of showing the approximate relative locations of Surveys 34 and 35, Block 194, and Section 103, the land here involved. *461

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Mrs. M. A. Smith, the widow of John Monroe, and the other defendants in error claim title to this land under a grant from the State. The Permian Oil Company claims title from the heirs of Hickox, but the Hickox title in turn depends upon a certain judgment in Cause No. 854, John Monroe v. Hickox, entered by the district court of Pecos County on March 4, 1911. John Monroe brought that suit, as owner of Section 103, against Hickox, who owned Sections 34 and 35, shown on the map, and a *"take nothing"* judgment was entered. That judgment is the primary subject of this opinion. The judgment reads as follows:

"In the District Court of Pecos County, Texas. February Term 1911, John Monroe vs. T. F. Hickox.

"On the 28th day of February A.D. 1911, came on to be heard the above numbered and entitled cause in its regular order on the docket, and thereupon came the plaintiff in person and by attorney, and also came the defendant in person and by attorney and all parties announced ready for trial, and no

jury having been demanded and all issues of law and fact being submitted to the court, the pleadings were thereupon read, the evidence introduced and argument of counsel made, and the court after hearing same, thereafter on the 4th day of March, A.D. 1911, in open court pronounced judgment in favor of the defendant. It is therefore ordered, adjudged, and decreed by the court that the plaintiff, John Monroe, take nothing by his suit, against the defendant, T. F. Hickox, and that the defendant, T. F. Hickox, go hence without day and recover against the plaintiff, John Monroe, all costs of suit, for which execution will issue. To which judgment of the court the plaintiff, John Monroe, in open court excepted and gave notice of appeal to the Court of Civil Appeals of the 4th Supreme Judicial District of Texas, sitting at San Antonio, Texas, and upon plaintiff's request and good cause being shown he is hereby given sixty days after the adjournment of this court within which to file his state[ment] of facts herein.

"O. K. W. C. Douglas, Judge."

This judgment was rendered on March 4, 1911, and on the same day the court filed his findings of fact and conclusions of law, which read:

"John Monroe vs. T. F. Hickox, No. 854, in District Court, Pecos County, Texas. February Term, 1911.

"I, W. C. Douglas, Judge of the District Court of Pecos County, Texas, have this day prepared and do hereby order filed in this cause, the following findings of fact and conclusions of law, to-wit:

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"FINDINGS OF FACT.

"1. Block C-4, G. C. S. F. Ry. Co., is composed of sixty-four surveys. The field notes show that they were all made by H. C. Barton, Deputy Surveyor of Pecos County, between the 5th and 20th days of October, 1881. According to the field notes of Survey No. 4, of this block, the northwest corner was marked as follows: 'Pile of pebbles for the N.E. corner of Survey No. 3, this block from which Capstone Mountain bears south 1500 varas,' the northeast corner is described as 'Stone mound from which Capstone Mountain bears S. 19 E. and another Capstone Mountain bears N. 70 E.,' corners answering to this description were found on the ground located relatively as shown in the sketch of surveyor, W. T. Hope.

"2. Block Z, Texas Central Railway Company, is composed of fifty-four surveys. They were made by F. Schadowsky, between the 4th and 8th days of November, 1882. The beginning calls of this block tie on to Block C-4. There is no testimony locating this block on the ground.

"3. Block 194, G. C. S. F. Ry. Company, is composed of one hundred surveys, the record showing they were made by I. W. Durrell, Deputy Surveyor of Pecos County, Texas, between the 17th and 31st days of May, 1883. It appears that he made fifteen surveys on each of the first six days and ten surveys on the seventh day. The beginning calls of this block tie on to Block Z, G. C. S. F. Railway, but there is no testimony locating on the ground any of the original land marks called for in the field notes.

"3. Block No. 178, Texas Central Railway Company, is composed of thirty-six surveys, the record showing they were made by I. W. Durrell, Deputy Surveyor of Pecos County. The first eighteen of these surveys appear to have been made on November 21, 1882, and the last eighteen made on November 22, 1882. The beginning call starts at river survey at No. 543, in the name of H. G. N. Railway Company. None of the land marks called for by the field notes of this block were located on the ground by any of the testimony.

"4. The river surveys shown on the map of surveyor W. T. Hope were made in the year 1876 by Jacob Kuechler, Deputy Surveyor of Pecos County, Survey 4, of Block C-4, G. C. S. F. Railway Company, located on the ground from objects found corresponding to the calls for its northeast and northwest corners relatively as shown on Hope's map. Survey 71, I. G. N.

Railway on the map of the surveyor, W. T. Hope, with its northwest corner marked by stone mound; there is no call in the field notes for a stone mound
464 at this point. Survey No. 61, *464 I. G. N. Railway was located on the ground relatively as shown on Hope's map by course and distance from the northwest corner of Survey 71, established as aforesaid, and its location verified by a call of its field notes for road on a mesa. Survey No. 3, Runnels County school land, was located on the ground by course and distance based on Surveys 71 and 61, which were located on the ground as aforesaid. All of these locations were made on the ground by surveyor W. T. Hope and were based on actual runnings as shown by the red lines delineated on this map. The balance of the surveys shown on the map of surveyor Hope were platted in by him according to their calls for course and distance based on his actual work on the ground shown by the red lines, and with relation to the aforesaid land marks.

"5. By beginning at the northeast corner of Survey 4, Block C-4, G. C. S. F. Railway Company, as found on the ground, and running by course and distance and thereby locating Surveys 103 and 104, Texas Central Railway; these two surveys would lie adjoining and immediately south of Survey 3, Runnels County school land, and would not conflict with Surveys 34 and 35, Texas Central Railway.

"6. By constructing Block 194, G. C. S. F. Railway, based on the calls for the river surveys, as located on the ground, surveys 34 and 35, G. C. S. F. Railway Company, Block 194 would lie adjoining and immediately south of Survey No. 3, Runnels County school land and be in total conflict with Surveys 103 and 104.

"7. Surveys 103 and 104, being the land sued for by plaintiff, are Junior surveys to Surveys 34 and 35.

"8. I am unable to follow the footsteps of the original surveyor in establishing Block 194, G. C. S. F. Ry., either in the original location of [or] the corrected surveys, and I am unable to ascertain the true intention of the original surveyor as to locating this block on the ground.

"9. *I am unable from the testimony in evidence to ascertain the true location on the ground of Surveys Nos. 103, 104, 34 and 35, above referred to.*

"10. I find that Block 194, G. C. S. F. Railway, was originally located by an office survey.

"11. *I find that the calls of Block 194 to tie on to Block Z and its calls to tie on to the river surveys are repugnant to each other and inconsistent, and I am unable to determine which of these calls should be regarded as a mistake of the surveyor.*

"12. I find that the plaintiff is the legal owner and holder of the fee simple title to Survey No. 103,
465 Texas Central Railway, *465 and that he holds Survey No. 104, under a contract of purchase from the State of Texas, in accordance with the school land laws, and that he has made his proof of occupancy thereon as required by law, and that his said sale is in good standing.

"13. Defendant is the holder and entitled to the possession of Survey No. 34, under a contract of purchase from the State of Texas, in accordance with the school land laws, and his sale is in good standing.

"14. The said Hope map is hereby referred to and made a part hereof.

"CONCLUSIONS OF LAW.

"1. The burden of proof is upon the plaintiff to establish the location of the two tracts of land sued for upon the ground, and to show that there is no conflict between said surveys and Surveys Numbers 34 and 35, and said Surveys Numbers 34 and 35 being senior surveys.

"2. It is presumed that the work of an official surveyor was actually done on the ground, but the amount of work he certified to having done within a given time, the character of the work as called

for by the field notes, and the lack of evidence found on the ground, discrepances in distances between objects called for, and the like, may be sufficient to rebut said presumption.

"3. Where there are two theories upon which a survey which is not fixed to the ground by any of its calls can be constructed, and one theory shows a conflict between a senior and a junior survey, and the other theory shows no conflict between them and the evidence, aided by the presumptions of law, furnishes no method for following the footsteps of the original surveyor or for arriving at the intent and purpose of the original surveyor, the presumption of the law will be resolved in favor of the senior survey that there is a conflict, the owner of the junior survey being the plaintiff.

"4. *Having found as a fact that the location of Surveys Numbers 34 and 35 and 103 and 104 cannot be located upon the ground from the testimony in evidence, and that there is a total conflict between them based on certain calls and no conflict based on other calls, which theories are irreconcilable, and the true theory unascertainable from the testimony, I conclude that the plaintiff should take naught by this suit and that the defendant should recover his costs herein.*

"W. C. Douglas, Judge District Court, 63rd Judicial District."

Endorsed: "No. 854. John Monroe vs. T. F. Hickox. Findings of fact and conclusions of law. Filed March 4, 1911. Frank *466 Rooney, Dist. Clk., Pecos Co., Tex., by H. L. Winfield, Dy." (All italics mine.)

Monroe's suit was in the statutory form of trespass to try title, and Hickox's answer was a plea of "not guilty." It was in reality a *boundary* suit, the parties thinking at the time that there was a conflict between the south boundary lines of sections 103 and 104 and the north boundary lines of sections 34 and 35. Of course, the Yates survey, 34 1/2 shown on the map, had not then been established by the State. In fact, the south boundary line of surveys 103 and 104 is shown as conterminous with the north boundary line of surveys 34 and 35 by the General Land Office maps of 1896 and 1907. Both these maps are in the record as plaintiff's (Permian Oil Co.'s) exhibits. It was not then understood or known that in truth and fact there was a vacancy between the surveys about one-half mile wide, now known as the Yates No. 34 1/2 survey. Monroe's suit, while filed in the statutory form of trespass to try title, was in reality a *boundary suit, and was tried as such.* I quite agree with Special Associate Justice FOUTS when he says in the majority opinion, *"measured by the familiar rule Cause No. 854 as tried was a boundary suit."* Being a boundary suit, the place of controversy was the conterminous line between surveys 103 and 104 on the one hand and 34 and 35 on the other. In this boundary controversy Monroe lost — did not prove his case, and the court adjudged that he *"take nothing."* We are now asked to decree that by these words *"take nothing"* Monroe lost and Hickox acquired title to survey 103, shown on the map, located approximately a half mile north of the line of controversy, and between which and sections 34 and 35 there then intervened a vacancy, upon which is now located the Yates survey No. 34 1/2. In other words, we are asked to say that the district court by its *"take nothing"* decree in a boundary suit awarded title to Hickox to a tract of land a half mile away, *which Hickox did not own, and which Monroe did own.* (See Fact Findings 12 and 13, quoted above.) That is stretching a *"take nothing"* judgment a little too far for my legalistic credulty to accept. I decline to believe that the trial judge intended to render, or that interpreted under established rules he did render, an India-rubber decree, that would stretch from the point of actual controversy across an intervening section of land, and enfold in its elastic embrace the premises here involved.

My immediate purpose is to determine the meaning and effect of the *"take nothing"* judgment. Under our system of jurisprudence a judgment is to be tested by its substance rather than by its form. Form is of slight importance, and
467 no particular *467 phraseology is required to make a judgment valid. A judgment should, of course, be appropriate to the proceedings in which it is rendered, show affirmatively that the merits of the case have been passed upon, and award the judicial consequences which the law attaches to the ascertained facts. 25 Tex. Jur., p. 446, Sec. 77. Among the requisites of a valid judgment is the universally approved one that where property is the subject of the decree it should be described with certainty, or furnish means of its identification. 25 Tex. Jur., p. 542, Sec. 81. A judgment must also be sufficiently definite and certain to define and protect the rights of all litigants, and must not be in the alternative, or be conditional or contingent. 25 Tex. Jur., pp. 456, 457, Secs. 84, 85. The rules of construction as applied to judgments generally is well stated in Texas Jurisprudence as follows:

"In accordance with familiar principles a judgment is construed as it is written. If plain and unambiguous, it is not to be interpreted in the light of subsequent or prior statements or acts of the court evincing judicial intention when the judgment was rendered. Nor can a judgment be sustained or explained by reference to the understanding of the parties, even though entered pursuant to stipulation. It must be read as an entirety, and if, taken as a whole and construed according to well-known rules, it is unambiguous, no room is left for interpretation."

However, if a judgment is *ambiguous,* familiar rules of construction may be applied:

"If the judgment is ambiguous, application is made of familiar rules of construction, such as that effect will be given to reasonable intendments, that a writing will be made to harmonize with the facts, that the circumstances will be considered, *and that a common-sense construction will be put on language as a whole.*" (Italics mine.)

In construing an ambiguous judgment *"it is always proper to look to the entire record, the pleadings, the issues made in the case, the testimony offered in support of the pleadings, the charge, the fact or facts found by the court, and other proceedings leading up to the judgment."* 25 Tex. Jur., pp. 461, 462, Sec. 89, and the many cases cited in the notes. Not only is it true that a judgment must conform to and be supported by the pleadings and the evidence, but in a case tried to the court "it must conform to and be supported by the findings of fact and conclusions of law." 25 Tex. Jur., p. 484, Sec. 103. Not only is it true that a judgment must conform to the verdict (25 Tex. Jur., p. 484, Sec. 104), *but it must conform to the conclusions of fact found by the trial judge when separately*
468 *stated.* R. S., *468 Arts. 2209, 2211; 25 Tex. Jur., p. 488, Sec. 106, and cases cited in the notes. As to this rule the statute cited expressly declares:

"Where a special verdict is rendered, *or the conclusions of fact found by the judge are separately stated, the court shall render judgment thereon unless set aside or a new trial is granted.*" (Italics mine.)

The rules stated above have a direct bearing on the proper interpretation of the judgment here involved, and are as applicable here as if the case were one of direct appeal from the decree before us for interpretation.

We are compelled to determine the meaning and effect of the judgment in Cause 854, previously described, in order to ascertain whether or not it is *res adjudicata* on the question of title to the land involved in the instant case. In interpreting that judgment we should assume that the trial judge who entered it did his duty, and followed the rules of law applicable to the case; that he intended to render a valid judgment, one which would not be set aside on appeal, one appropriate to the proceeding, and which awarded the judicial

consequences which the law attached to the ascertained facts; that he intended to make his decree certain, and not conditional or contingent; and that he intended to follow the statute (Art. 2209), which was but the embodiment of the rule as generally applied by courts, and conform his decree to the *"conclusions of fact"* found by him and "separately stated," found, and filed on the very day the judgment was rendered. 25 Tex. Jur., p. 460, Sec. 87; Austin v. Canaway, 283 S.W. 189; Freeman on Judgments, (5th ed.) Vol. 1, p. 132, Sec. 76; 34 C. J., p. 501, Sec. 794, p. 504, Sec. 797. As a leading authority states: "When the language is susceptible of two interpretations, from one of which it follows that the law has been correctly applied to the facts and from the other that there has been an incorrect application, that construction will be adopted which upholds the judgment." 25 Tex. Jur., pp. 459, 460, Sec. 87; Gough v. Jones, 212 S.W. 943; 34 C. J., p. 501, Sec. 794.

I shall now for the moment assume that the judgment before us (in Cause No. 854, previously quoted) is ambiguous, and determine whether or not the judgment roll, embracing in this instance the findings of fact and conclusions of law of the trial judge, previously quoted, were admissible in evidence in this suit. The Permian Oil Co. depends for its title upon that decree, and says that by force of that judgment their predecessor in title, Hickox, became the owner of the land here involved, and that it is *res adjudicata* of the *issue of title* of the
469 defendants *469 in error, who claim under John Monroe, who brought and lost the suit in which the judgment was entered. Of course, if the judgment is not ambiguous, nothing is admissible to explain it. It explains itself. 25 Tex. Jur., p. 459, Sec. 86, supra. Nor can the judgment roll or anything else be used to contradict an unambiguous decree. 25 Tex. Jur., p. 853, Sec. 328. There are exceptions to the rules just stated, but they are not here involved. 25 Tex. Jur., p. 862, Sec. 331. *But once it is determined that a judgment is ambiguous, the whole record may be examined to ascertain its meaning, and it will not be given a more extensive effect than is warranted by the record.* 25 Tex. Jur., p. 461, Sec. 89; Freeman on Judgments, (5th ed.) Vol. 1, p. 134, Sec. 76; 34 C. J., p. 501, Sec. 794, p. 504, Sec. 797, p. 505, Sec. 801; Black on Judgments, (2d ed.) Vol. 1, p. 179, Sec. 123; Durden v. Roland, 269 S.W. 274; Dunlap v. Southerlin, 63 Tex. 38; Campbell v. Schrock, 50 S.W.2d 788; Houston Oil Co. v. Village Mills, 241 S.W. 122, 129; Poitevent v. Scarborough, 103 Tex. 111; Lipsits v. Bank, 293 S.W. 536; Barnes v. Hobson, 250 S.W. 238; Oklahoma v. Texas, 256 U.S. 70, 88; Last Chance M. Co. v. T. M. Co., 157 U.S. 685, 690; Barton v. Chrestman, 275 S.W. 401; Campbell v. Laughlin, 280 S.W. 189.

In Texas Jurisprudence (Sec. 89, supra) the rule is stated as follows:

"In construing an ambiguous judgment it is always proper for the court to look to the *entire record* (including the citation), the pleadings, the issues made in the case, the testimony offered in support of pleadings, the charge, *the fact or facts found by the court,* and other proceedings leading up to the judgment." (Italics mine.)

In Freeman on Judgments (Sec. 77) cited above, the text reads:

"If the entry of a judgment is so obscure as not to express the final determination with sufficient accuracy, reference may be had to the pleadings and to the entire record. If, with the light thrown upon it by them, its obscurity is dispelled, and its intended signification made apparent, it will be upheld and carried into effect. In case of doubt regarding the signification of a judgment, or of any part thereof, the whole record may be examined for the purpose of removing the doubt. One part of the judgment may be modified or explained by another part; and uncertainties in the judgment may become certain under the light cast upon them by the pleadings or other parts of the record. This is well illustrated in those cases in
470 which the *470 description of property in the

judgment is supplemented and made certain in this manner. And the judgment will not be given a more extensive effect in this respect than is warranted by the record."

Black on Judgments (Sec. 123 cited above) states:

"The rule for the construction of ambiguous judgments is clearly stated by the Supreme Court of Kansas in the following language: 'Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms.' "

The texts cited from 34 Corpus Juris declare:

"The legal operation and effect of a judgment must be ascertained by a construction and interpretation of it. This presents a question of law for the court. Judgments must be construed as a whole, and so as to give effect to every word and part. The entire judgment roll may be looked to for the purpose of interpretation. Necessary legal implications are included although not expressed in terms, but the adjudication does not extend beyond what the language used fairly warrants. The legal effect, rather than the mere language used, governs. *In cases of ambiguity or doubt, the entire record may be examined and considered. Judgments are to have a reasonable intendment. Where a judgment is susceptible of two interpretations, that one will be adopted which renders it the more reasonable, effective and conclusive, and which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered.*" (Sec. 794, italics mine.)

"Where the language of a judgment is ambiguous or its meaning doubtful, reference may be had to the pleadings in the case, and the judgment interpreted in the light which they throw upon it. But if the meaning of the judgment is clear and plain on its face, it can not be changed, extended, or restricted by anything contained in the pleadings." (Sec. 796.)

"A judgment should be interpreted with reference to the verdict of the jury, and if possible so as to harmonize them. Like rules apply where the facts are found by the court or referee." (Sec. 797, italics mine.)

Writing on "The Judgment as an Estoppel," FREEMAN in his work on Judgments, in part, says: *471

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"To determine what was adjudicated in a prior action the record in that case may, of course, be considered. The judgment itself must be properly proved. But inasmuch as the mere judgment may not alone establish the jurisdiction of the court, or show what matters were determined, it is ordinarily necessary to prove the whole judgment-roll or record when a judgment is urged as an estoppel or bar. And even though it may not always be necessary, it is always proper to do so. But as to just what may be regarded as a part of the record for this purpose and what extrinsic matters may be proved or considered, there is no absolute or universal rule. However, it is quite generally agreed that the pleadings, instructions to the jury and the verdict, *or the findings and conclusions, may be looked to to determine what was adjudicated.*" (Italics mine.) Freeman on Judgments, (5th ed.) Vol. 2, Sec. 771.

The Texas authorities are consistent with the texts cited and quoted.

It is also quite elementary that when reference must be had to the record in interpreting an ambiguous judgment, the *whole* record may be examined. As said in Black on Judgments, (2d ed.) Vol. 1, p. 181, Sec. 124:

"* * * and when a copy of the record of the judgment is required, for the purpose of bringing the case by appeal or writ of error into this court, or bringing suit upon it in another state, or as

evidence under an issue of nul tiel record, *or to establish a former adjudication of the same subject-matter between the same parties,* and indeed in all cases where it is essential to have a complete record of a judgment, the pleadings and process are an indispensable part of it. *And the general rule is, that where the copy of a record of a judgment is required, it must be of the whole record, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part.*" (Italics mine.)

Indeed, not only is it true that the whole record may be examined in interpreting an ambiguous judgment, but evidence outside the record, even parol, is admissible to show for what the judgment was recovered, *"what was the real cause of action."* 34 C. J., p. 506, Sec. 803; Labrie v. McKim, 120 S.W. 1083; Cook v. Burnley, 45 Tex. 97; Russell v. Place, 94 U.S. 606; Freeman v. McAninch, 87 Tex. 132, 135; Reast v. Donald, 84 Tex. 648; Oldham v. McIver, 49 Tex. 556, 572.

Is the judgment before us (in Cause No. 854) ambiguous? That it is so is not open to discussion. You can not from the face of the judgment
472 determine the nature of the cause of *472 action, what was sued for, nor what was recovered, if anything; nor does it contain the description of any property or land. As it stands it is not only ambiguous, but absolutely meaningless. When you read it you know that Monroe sued Hickox and lost, but whether the suit was for land, personal injuries, foreclosure of a lien, etc., you can not determine from the face of the decree. You might infer from the names that it was *not a suit for divorce,* and that is as definite a conclusion as the face of the judgment warrants. So it was, and is, necessary to examine the record to determine the nature of the cause of action, the description of the property involved, if any, and to ascertain the facts found by the trial court, in order that we may so interpret the decree in such a manner that it will award the judicial consequences of the ascertained facts. (Authorities supra.)

The majority opinion in this case says the judgment is not ambiguous, although it states: *"It is true the description of the land and the nature of the cause of action do not appear in the face of the judgment."* (Italics mine.) The opinion then proceeds to hold, if I understand it correctly, that this is supplied "by the direct reference to the plaintiff's pleadings appearing in the face of the judgment." Then, declares the opinion, "By this reference in the judgment there is as effectively supplied the description of the land and cause of action disposed of as though the judgment had recited both in its face," citing Freeman on Judgments, (5th ed.) Vol. 1, Sec. 97; Martin v. Teal, 29 S.W. 691; and Ruby v. Von Valkenberg, 72 Tex. 450. The language of the judgment to which the opinion makes reference, following recitation of appearance, is found in the following extract: " *The pleadings were thereupon read, the evidence introduced, and argument of counsel made,* and the court after hearing same," pronounced judgment, etc. This is a mere recital that the pleadings were read, and no more incorporated the description of the cause of action and of the land contained in the petition in the judgment than it did "the evidence introduced and argument of counsel made." Of course, the pleadings, like the balance of the record, could be considered in interpreting an ambiguous judgment, but to say that this bare recital that the pleadings were read so incorporates the pleadings in the decree as to relieve it, as it stood, of its ambiguous character, is a doctrine so novel and strange as to be, I believe, without precedent. Certainly the authorities cited in no manner support it. The text cited from Freeman on Judgments reads:

"In view of the principle that that is certain which is capable of being made certain, it is generally
473 held that a reference to *473 the pleadings or other parts of the record is sufficient if they contain an adequate description. If the property is sufficiently described in the declaration it is sufficient for the judgment to refer to it as the premises 'mentioned

in the declaration.' But if the description referred to is itself uncertain, it can not aid the judgment, as where a writ is directed to issue to restore to plaintiff possession of the lands, or so much thereof as are not farther south than the boundary line described in the verdict, and the verdict merely designates such line as being seven and nine feet south of a certain hedge. A judgment for 'the tract of land described in the petition,' which in fact describes two tracts, is insufficient. But describing property as 'the property in controversy' may be sufficient." (Sec. 97.)

FREEMAN, as shown, has reference to decrees which refer to the pleadings specifically for descriptive purposes, as "the tract of land described in the petition," etc.

In Martin v. Teal the judgment in part was that "the wire fence enclosing survey 70, and in controversy," etc., and that the defendant recover possession of said "one mile or more of wire fence enclosing said survey and the subject matter of this controversy." All the Court of Civil Appeals held was that the judgment was sufficient "when it refers for such description to pleadings by which it can be made certain."

In Ruby v. Von Valkenberg a judgment rendered in 1847 was introduced in evidence, which decreed "that the property conveyed by plaintiff and wife by deed, *of which plaintiff has incorporated a copy into his petition and which is made a part of this decree.*" This Court simply held that under the law as it existed when the judgment was entered this was permissible.

The question here involved, viz., whether a bare recital that the pleadings were read in a district court case relieved a vague and meaningless judgment of its ambiguity to such an extent as forbids reference to the complete judgment-roll in its interpretation, was not involved nor determined by either of the authorities cited. The plain fact is that the plaintiffs in error are depending upon an ambiguous judgment, and the whole judgment roll record is admissible to determine its meaning, — not just a part of the record, the pleadings for example, — but the whole of it, *"so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part."* (Black on Judgments, Sec. 124, supra.) However, if it be said that the bare recital in the judgment that the pleadings were read had the legal effect of incorporating within the judgment itself the entire petition in Cause No. 854 (which, as a matter of law, common sense, and common practice it does
474 *474 not), still the judgment would not be relieved of its ambiguous character, and resort must still be had to ascertain the character of suit in which the judgment was entered, and the effect to be given to the decree, as awarding the judicial consequences to the determined facts. The petition in form was one of statutory trespass to try title, and the answer consisted of a plea of "not guilty." Looking at the petition and answer alone, what sort of suit was it? The answer is that nobody can tell. It might, of course, be one to actually determine who possessed the title to the land described, but it might be for any one of a number of other purposes, viz.:

(1) It might be a *boundary suit,* to determine a boundary line between two adjacent surveys, for it has long been the law that such suits could be brought in form of trespass to try title; or

(2) it might be an action brought by a grantor to recover the land because of a breach of condition of a deed, as, for example, for failure to pay purchase money notes; or

(3) an action by a landlord who seeks to compel his tenant to vacate the premises upon expiration of a lease; or

(4) an action by an owner whose land has been appropriated for public use without compensation; or

(5) an action to attack the validity of process or sale under execution.

41 Tex. Jur., p. 458, Sec. 5; Weaver v. Vandervanter, 84 Tex. 691; Kaufman v. Brown, 83 Tex. 41; Andrews v. Parker, 48 Tex. 94; Garner v. C. R.I. G. R. Co., 10 S.W.2d 132; Spencer v. Rosenthal, 58 Tex. 4; Purinton v. Davis, 66 Tex. 455; Smith v. Cottingham, 49 S.W. 145; Curran v. T. L. Mtg. Co., 60 S.W. 466; Bull v. Beardon, 159 S.W. 1177.

It is obvious that since the judgment interpreted alone by the petition in this case does not disclose which one of the many actions which could be brought in the form of trespass to try title was in fact brought and tried, it is ambiguous as not disclosing the nature of the action, an important factor in determining the effectiveness of a plea of *res adjudicata*. Shall we say that when a vendor brings a trespass to try title suit against his vendee because the latter has defaulted in the payment of purchase money, and the court decrees that he "take nothing" in the judgment, without disclosing in the decree that he does this because in his fact findings he has found that the vendee has not defaulted in payment, that thereby the vendee has recovered the land and has his vendor's title, and that the balance of the record, including the
475 findings of fact, may not be looked *475 to to ascertain what was actually litigated? I think not, although that would be the certain result under the majority opinion in this case. Shall we say that when a landlord brings a trespass to try title suit against his tenant, and is defeated in fact because the tenancy is not up, that the tenant under a "take nothing" judgment would get his landlord's title, and that the record, including the fact findings, could not be examined to determine just what was litigated? I think not, and yet under the majority opinion in this case that would be the result. Many other illustrations of the result of an application of the doctrine of the majority opinion in this case could be given, but the above suffice to show the grave injustice of looking only to the "take nothing" decree and the pleadings as alone determining what has actually been litigated by a trespass to try title action. GREENLEAF says:

"When a former judgment is shown by way of bar, whether by pleading, or in evidence, it is competent for the plaintiff to reply, that it did *not relate to the same property or transaction* in controversy in the action, to which it is set up in bar; and the question of identity, thus raised, is to be determined by the jury, upon the evidence adduced. And though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet if, upon the whole record, it remains doubtful whether the same subject-matter were actually passed upon, it seems that parol evidence may be received to show the truth. So, also, if the pleadings present several distinct propositions, and the evidence may be referred to either or to all with the same propriety, the judgment is not conclusive, but only *prima facie* evidence upon any one of the propositions, and evidence *aliunde* is admissible to rebut it." (Greenleaf on Evidence, (15th ed.) Vol. 1, Sec. 532.)

GREENLEAF adds in his notes:

"It is obvious that, to prove what was the point in issue in a previous action at common law, it is necessary to produce the *entire record*. Foot v. Glover, 4 Blackf. 313. And see Morris v. Keyes, 1 Hill 540; Glascock v. Hays, 4 Dana 59."

As I understand the majority opinion in this case, it disregards the difference between a trespass to try title suit which involves and determines title, and a trespass to try title suit which involves and determines boundary. After referring to the fact that formerly we permitted *two* suits for title and only *one* over boundary, though each might be brought in form of trespass to try title, and that from 1892, for forty years or more, this Court under the statute had jurisdiction over trespass to try title suits when they were in reality title suits,
476 but had *476 none over boundary suits, although brought in the form of trespass to try title, the opinion declares:

"We are unwilling to accept cases of either class as authority for the proposition that different causes of action are involved in trespass to try title suits brought in statutory form one of which turns on the fact of boundary and the other of which turns on some other evidentiary fact affecting title."

That quotation plainly shows that the majority opinion disregards the essential difference between a trespass to try title suit *involving and determining title, and a trespass to try title suit involving and determining boundary.* The rule thus announced, I believe, is without precedent and without authority, and the opinion, in so far as I am able to understand it, cites none.

For many years after the adoption of the common law and the Trespass to Try Title Statute in 1840, our statutes permitted two suits for the recovery of title to lands by the plaintiff, the second within a limited time after the first, although he lost the first one. Then, as now, these suits were to be in the form of trespass to try title. This Court, of course, following the statute, recognized that an adverse judgment in the first suit was not *res adjudicata* or a bar to the plaintiff's right to timely file and try the second suit. But this Court held that if the first suit, though in form of trespass to try title, was in reality a *boundary* suit, an adverse judgment *was res adjudicata* and barred the second suit. Jones v. Andrews, 72 Tex. 5, 12; Spence v. McGown, 53 Tex. 30; Bird v. Montgomery, 34 Tex. 713; San Patricio v. Mattis, 58 Tex. 242.

In the case of Jones v. Andrews, just cited, the Court makes clear its recognition of the distinction between a suit involving and to determine title, and one involving and to determine boundary, approving the rule that where a suit though *nominally* to try title, was in fact to settle a disputed boundary, it was not a title suit.

It is well within the recollection of the Bar generally that from 1892 until a few years back the Courts of Civil Appeals had final jurisdiction over boundary suits, and this Court, though clothed with power to hear title suits, had no such authority over boundary suits, even though brought in form of trespass to try title. Wright v. Bell, 94 Tex. 577; Schiele v. Kimball, 194 S.W. 944; Cox v. Finks, 91 Tex. 318; Steward v. Coleman Co., 95 Tex. 445. So, for approximately an hundred years the jurisprudence of Texas has recognized a difference between title and boundary suits, even though each were brought in the statutory form of trespass to try title. I think it
477 too late, *477 without legislative action, to now say that we will no longer recognize the distinction and apply rules of law respectively applicable. Of course, it is true that in a boundary suit the defendant, like *Bre'r Rabbit* in the fable, can sit and say nothing, and compel the plaintiff to prove his title; but this does not make it a title suit — it still remains a boundary suit. Cox v. Finks, 91 Tex. 318, 320. The majority opinion in this case quite rightly says: *"Measured by the familiar rule, Cause No. 854 as tried was a boundary suit."* I am of the opinion that the "take nothing" judgment should be interpreted as a "take nothing" judgment would be interpreted in a boundary suit, and in harmony with the court's findings of fact and conclusions of law, instead of as if in a title suit, as the majority opinion holds. When we go to the record, and examine the court's findings of fact and conclusions of law, we find that in fact the court did not determine the question of boundary, because he was unable to locate the surveys whose conterminous lines were involved. He so stated in fact finding No. 9, quoted above. In No. 4 of his conclusions of law, quoted supra, the court stated his reasons for entering the "take nothing" judgment, as follows:

"4. *Having found as a fact that the location of Surveys Numbers 34 and 35 and 103 and 104 cannot be located upon the ground from the testimony in evidence, and that there is a total conflict between them based on certain calls, and no conflict based on other calls, which theories are irreconcilable, and the true theory unascertainable from the testimony, I conclude*

that the plaintiff should take naught by this suit and that the defendant should recover his costs herein." (Italics mine.)

It is perfectly plain from this conclusion that the words "take nothing" as used in the judgment were not intended to award title to any land, — not even a disputed strip to Hickox. The judge said, "I conclude that the plaintiff should *take naught*" by this suit because the allegedly conflicting surveys could not be located on the ground; in other words, the plaintiff should "take naught" simply because he had failed to make a case.

The words "take nothing" used in the judgment are not words defined by statute; nor are they defined in Words and Phrases and other similar works. They are to be interpreted in the same manner that other words are interpreted, — and here, as found in an ambiguous decree, must have their meaning determined in connection with the basis of that decree, viz., the findings of fact and conclusions of law of the trial court. That by their use, and by the judgment rendered, the court did not intend to award title to section 103 to Hickox is shown by
478 his *478 finding No. 12, quoted above, in which he said: " *I find that the plaintiff* [Monroe] *is the legal owner and holder of the fee simple title to Survey 103,*" etc. It is also plain, I think, that by the judgment the court did not intend to fix or establish any boundary line. The judgment is ambiguous, and that interpretation is the only one consistent wih his findings of fact and conclusions of law to the effect that he could not locate on the ground the surveys involved or their conterminous boundaries.

The object and purpose of a suit to determine title and those of a boundary suit are plainly different, and require different types of judgment. The object of a trespass to try title suit to establish and determine title is, of course, to ascertain who has the superior title to the land; and a judgment which describes the land involved as it is described in the petition, either directly or by reference, is sufficient as to description, even though simply a copy of the field notes of the patent, — provided, of course, by it the land may be located. Freeman on Judgments, (5th ed.) Vol. 1, Sec. 96. The object and purpose of a boundary suit is to ascertain the boundary, and the judgment determines the location of the line on the ground and describes and identifies it. 41 Tex. Jur., pp. 680, 681, Sec. 173. And it is elementary that a decree which does not do so is void; and since a description which merely follows that of the patent settles nothing, but leaves the parties where they were when the suit began, the judgment is void. Converse v. Langshaw, 81 Tex. 275, and other authorities cited by Justice HIGGINS in Permian Oil Co. v. Smith, 47 S.W.2d 500, 507, et seq.

Bearing in mind these differences in the objects and purposes of suits to determine title and those to ascertain and fix boundaries, and the resultant differences in the descriptions which must characterize the judgments, it is plain that a "take nothing" decree in a boundary suit does not transfer title, because it does not establish and determine the boundary. Such was the effect given to a general judgment for the defendant in a previous boundary suit in the case of Wallis v. Wofford, 26 S.W. 739, by Justice WILLIAMS, who afterward for many years graced the Supreme Bench of Texas. In the reported case a judgment for the defendant in the former suit was set up as a bar to the maintenance of the action. Justice WILLIAMS overruled the contention, saying:

"But, from the petition, it does not appear that any line was fixed. The judgment was simply for defendant, which means that plaintiff had not shown himself entitled to judgment for the land for which he sued. Whatever may be the effect of
479 *479 that judgment, it does not fix any boundary, and does not preclude appellant from asserting title to any land which, under or consistent with it, he may show himself to have."

In this connection, and without elaboration, I desire to state that I approve what Mr. Justice HIGGINS has said as to the invalidity of the judgment here involved, because of its failure, in the light of the record, to determine the boundary dispute. See Permian Oil Co. v. Smith, 47 S.W.2d , pp. 500, 507, et seq.

Thus far I have regarded the judgment here involved as one rendered in a boundary suit. If it be said, however, that it was in truth and in fact a suit for title (which it was not), still the result produced by proper observance of the rules of interpretation is the same, viz., that the "take nothing" judgment did not have the effect of awarding Monroe's title to Hickox. We are dealing with an ambiguous judgment — a meaningless one, until it is read in connection with the judgment roll. When we go to the judgment roll and examine the findings of fact and conclusions of law, it is at once apparent that the court did not intend to award the title to Survey 103 to Hickox, because he says, as I have shown, that Monroe owned that survey. An ambiguous judgment is to be interpreted in harmony with the findings and conclusions of the trial court, if this can be done. Authorities supra; R. S., Arts. 2209, 2211; 25 Tex. Jur., p. 488, Sec. 106. Even if it be said that the "take nothing" judgment here was rendered in a title suit, there is still another reason why it was not effective to transfer title from Monroe to Hickox. Assuming that the ordinary effect of a "take nothing" judgment is to transfer title to the defendant, it is plain, I think, that the rule has no application where the court deciding the case is unable to locate the land, and at the very time of the rendition of the judgment finds that it can not be located.

An action to try title is a proceeding *in rem* or of the nature of such a proceeding. 41 Tex. Jur., p. 678, Sec. 170. The title is transferred because of the court's jurisdiction of the land, and the decree operates, not *in personam,* by compelling the adverse party to execute a transfer, but *in rem,* upon the land and title to the land. *If the title is transferred, the transfer is effected by the judgment itself operating upon the property within the jurisdiction of the court.* "The foundation of jurisdiction is physical power" (McDonald v. Maybee, 243 U.S. 90, 91), that is, the power to seize a thing that actually exists, — *and the court knows exists,* — and deliver into the possession of the party to whom has been adjudged rightful
480 possession. A *480 court is without jurisdiction to transfer by mere force of its judgment title to land which the court can not locate, and expressly finds that he can not locate; — indeed, in this case the court could not be certain of the existence of the land which the suit purported to involve. In truth, the court in his conclusion of law No. 4, heretofore quoted, said that he concluded that " *the plaintiff* [Monroe] *should take naught,*" because the surveys involved could not be located. In the light of that conclusion, his "take nothing" judgment must be interpreted, and to say that by it he transferred title to Hickox, the defendant, is not only against sound reason, but would assume that the court deliberately entered a *void judgment,* — one he knew at the time was void, — for the reason that it is elementary that a decree must so describe the property awarded that it may be found and located on the ground. 41 Tex. Jur., p. 683, Sec. 175. If the court was unable to locate the land involved, as he concluded, and yet entered a judgment awarding it to Hickox, then we would be compelled to say he deliberately entered a void decree. The judgment is not to be interpreted in this manner if there is an interpretation which makes the judgment valid. Authorities supra; 25 Tex. Jur., p. 460, Sec. 87; Gough v. Jones, 212 S.W. 943. A proper interpretation of the judgment before us is that it had no purpose to transfer title, and that the "take nothing" order was entered merely because the plaintiff had failed to prove his case by the location of the surveys and the conflicting conterminous lines, if any. The case of Freeman v. McAninch, 87 Tex. 132, bears no relationship to the instant case. The statement of that case by Judge STAYTON, in part, is as follows:

"On December 7, 1878, John D. Freeman brought an action against J. F. McAninch and Daniel McCray to recover a tract of land containing 622 1/2 acres, part of one-third of a league of land originally granted to Joseph Washington. The petition was in the usual form of petitions in actions of trespass to try title, and described the land sued for by metes and bounds.

"Defendants demurred to the petition, pleaded not guilty, limitation of three and ten years, and set up title in themselves to part of the land, giving description of that which each claimed, under a survey made by virtue of certificate issued to George Allen.

"They also pleaded in estoppel acts of D.C. Freeman, and claimed value of improvements made in good faith.

"The cause was tried before a jury, and upon a verdict for plaintiff judgment was rendered in his favor for all the land sued for, which in the
481 judgment was described as in the petition. *481

"From that judgment defendants prosecuted a writ of error to the Supreme Court, where the judgment was affirmed.

"Defendants in that action seek in this to avoid the effect of that judgment as an adjudication of the title to all the land described in the petition and judgment; and Daniel McCray now asserts title to 134-1/3 acres of the land embraced in that judgment, to which he asserts title through a conveyance made by D.C. Freeman pending that action."

Daniel McCray sought to avoid the judgment against him to 134-1/3 acres of the land because of some oral agreement had with the lawyers, which was no part of the judgment roll, and by reason of which he did not introduce in evidence his title. All that Judge STAYTON held was that he could not contradict the judgment by evidence of such an agreement, and that he was concluded by the decree in the previous suit. Briefly, that is all that was decided, and in no way sustains the contention of the Permian Oil Co. in the case before us.

I approve what is said in the opinion of the majority with reference to recordation of judgments, notice, innocent purchasers, etc. From what I have said above my disagreement with the majority on the vital question here involved is apparent. I am of the view that the judgment of the Court of Civil Appeals should have been affirmed; and since this was not done, and for the reasons herein shown, I respectfully dissent from the majority opinion.

Opinion delivered July 7, 1937.

No. 05-12-00471-CV
Court of Appeals of Texas, Dallas.

Pjetrovic v. 4HG Fannin Investments, LLC

400 S.W.3d 119 (Tex. App. 2013)
Decided May 1, 2013

No. 05–12–00471–CV.

2013-05-1

Medo PJETROVIC, Appellant v. 4HG FANNIN INVESTMENTS, LLC, Kyle Payne, and Mary Payne, Appellees.

John A. Koepke, Scott Masur Mcelhaney, Scott E. Hayes, Susan Oliver, Dallas, TX, for Appellants. Dan S. Boyd, Jeffrey Wallace Hellberg Jr., Dallas, TX, Myles Keith Porter, Bonham, TX, for Appellee.

120 *120

John A. Koepke, Scott Masur Mcelhaney, Scott E. Hayes, Susan Oliver, Dallas, TX, for Appellants. Dan S. Boyd, Jeffrey Wallace Hellberg Jr., Dallas, TX, Myles Keith Porter, Bonham, TX, for Appellee.

Before Justices FITZGERALD, FILLMORE, and EVANS.

OPINION

Opinion by Justice FILLMORE.

Medo Pjetrovic appeals the dismissal of his claims against 4HG Fannin Investments, LLC (4HG), Kyle Payne, and Mary Payne arguing, in one issue, that the trial court erred by dismissing his claims because the receiver acting on Pjetrovic's behalf did not have authority to agree to the dismissal of the lawsuit. We reverse the trial court's order dismissing Pjetrovic's claims and remand this case for further proceedings.

Background

On November 24, 2008, Eloy Construction Interiors, LLC obtained a default judgment in the amount of $3,550 against Pjetrovic in cause number DC–08–10524, *Eloy Construction Interiors, LLC v. Medo Pjetrovic,* in the 101st Judicial District Court of Dallas County, Texas. On December 28, 2010, a judgment was rendered against Pjetrovic by the 68th Judicial District Court in cause number DC–09–17452, *Dieter Schwarz d/b/a Market Square v. Medo Pjetrovic, Jerilyn Geozeff d/b/a Venice Italian Restaurant, and Frances Pjetrovic.* [1] A writ of execution was issued on the *Schwarz* judgment and, on October 4, 2011, the Fannin County sheriff sold two pieces of real property belonging to Pjetrovic. 4HG's successor in interest bought one of the properties, and Kyle and Mary Payne bought the other.

[1] This judgment is not in the appellate record.

On October 19, 2011, Pjetrovic sued 4HG and the Paynes in the case that is the subject of this appeal (the 4HG litigation) seeking to set aside the two deeds and to quiet title to the real property in Pjetrovic. In response to a motion for summary judgment filed by 4HG and the Paynes, Pjetrovic indicated that, if required to do so by the trial court, he would tender into the registry of the court the amount of money paid by 4HG and the Paynes for the real property. The trial court required Pjetrovic to tender $271,850 into the registry of the court before January 13, 2012.

On January 9, 2012, based on Eloy's application for turnover, an associate judge signed a turnover order in the *Eloy* litigation that appointed a
121 receiver to "take *121 possession of, maintain, operate, and/or sell the leviable assets" of Pjetrovic, specifically including Pjetrovic's claims and causes of action in the 4HG litigation, and to assist Eloy in satisfying the *Eloy* judgment. A "green card" for a certified mailing indicates Pjetrovic received notice of the turnover order on January 10, 2012.

At 3:39 p.m. on January 12, 2012, counsel for the receiver sent an email to Pjetrovic's counsel in the 4HG litigation informing him of the receivership, stating the amount owed on the *Eloy* judgment, including attorney's fees, was approximately $6,000, and demanding Pjetrovic's counsel release any funds belonging to Pjetrovic that were in his counsel's possession. Counsel for the receiver also indicated there was a hearing set in the 4HG litigation at 8:45 a.m. on January 13, 2012, he intended to appear at the hearing on behalf of the receiver, and he needed the file for the case delivered to his office by 5:00 p.m. on January 12, 2012. Pjetrovic's counsel, who was apparently in depositions on January 12, 2012, responded by email at 6:54 p.m. that there was not a hearing scheduled in the case for January 13th, he would be "out most of tomorrow," and he would review the email and "get back" to the receiver's counsel, "likely early next week."

On January 13, 2012, 4HG, the Paynes, and the receiver agreed to settle Pjetrovic's claims against 4HG and the Paynes for $6,000, and the receiver agreed to dismiss Pjetrovic's claims against 4HG and the Paynes. The trial court signed an agreed order dismissing Pjetrovic's claims against 4HG and the Paynes.

On January 17, 2012, Pjetrovic appealed the associate judge's turnover order in the *Eloy* litigation to the 101st District Court. On February 10, 2012, Pjetrovic filed in the 4HG litigation a combined motion to set aside or vacate the order dismissing the case and motion for new trial. Pjetrovic contended the receiver did not have authority on January 13, 2012 to agree to dismiss the lawsuit because the turnover order in the *Eloy* litigation had been appealed to the 101st District Court. Pjetrovic also argued he did not receive notice of the request to appoint a receiver or of the turnover order, he did not consent to the dismissal of his claims, and equity required that the dismissal be set aside. On March 14, 2012, Pjetrovic filed a supplement to the motion stating the *Eloy* judgment had been paid. The judge for the 101st District Court denied Pjetrovic's appeal of the associate judge's order on February 27, 2012.

4HG and the Paynes filed a response to Pjetrovic's combined motion asserting the turnover order was valid on January 13, 2012 because there was no pending appeal of the associate judge's order on that date, 4HG and the Paynes also argued that, because Pjetrovic failed to have a hearing on his appeal in the 101st District Court within thirty days of the associate judge's order, the turnover order was confirmed as the order of the district court on February 9, 2012. Finally, 4HG and the Paynes asserted the receiver did not need Pjetrovic's consent to settle the claims, Pjetrovic did not have standing to file the motion to set aside, and there was no equitable basis on which to set aside the dismissal.

The trial court did not rule on Pjetrovic's motion to set aside or vacate the order dismissing the case. Pjetrovic's motion for new trial was overruled by operation of law.

Motion to Dismiss

4HG and the Paynes filed a motion to dismiss this appeal asserting that, because Pjetrovic failed to appeal the turnover order in the *Eloy* litigation to this Court, he does not have standing to challenge
122 *122 the authority of the receiver in this appeal. A lack of standing deprives a court of subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 444–45 (Tex.1993); *Hall v.*

Douglas, 380 S.W.3d 860, 872 (Tex.App.-Dallas 2012, no pet.). "[A] party whose own interest is prejudiced by an error has standing to appeal." *Torrington Co. v. Stutzman,* 46 S.W.3d 829, 843 (Tex.2000); *see also Hall,* 380 S.W.3d at 872 ("A person has standing to sue when he is personally aggrieved by the alleged wrong.").

In this appeal, Pjetrovic is not attempting to challenge the appointment of the receiver. Rather, Pjetrovic is arguing the trial court erred by dismissing his claims because, on January 13, 2012, the receiver did not have authority to agree to the dismissal. Pjetrovic further asserts that he was harmed by the settlement because his claims were worth much more than the settlement value agreed to by the receiver. We conclude that Pjetrovic has asserted he was prejudiced by the trial court's dismissal of his claims based on the receiver's allegedly unauthorized agreement to settle the claims against 4HG and the Paynes, Therefore, regardless of whether Pjetrovic appealed the ruling of the 101st District Court confirming the associate judge's appointment of the receiver, Pjetrovic has standing to assert the receiver did not have authority on January 13, 2012 to settle Pjetrovic's claims against 4HG and the Paynes. *See, e.g., Allstate Indem. Co. v. Forth,* 204 S.W.3d 795, 796 (Tex.2006) (per curiam) (plaintiff did not have standing to assert insurer settled her claim in arbitrary and unreasonable manner because she did not claim manner in which insurer settled claim caused her any injury). Accordingly, we deny 4HG and the Paynes' motion to dismiss this appeal.

Dismissal of Pjetrovic's Claims

In one issue, Pjetrovic contends the trial court erred by dismissing Pjetrovic's claims against 4HG and the Paynes because the receiver did not have authority to act on behalf of Pjetrovic on January 13, 2012.

Standard of Review

Pjetrovic's complaint requires us to determine the effect of chapter 54A of the government code, setting out a statutory scheme governing the appointment and use of associate judges in civil cases, on the receiver's authority to agree to dismiss Pjetrovic's claims. We review questions of statutory construction de novo. *Molinet v. Kimbrell,* 356 S.W.3d 407, 411 (Tex.2011).

When construing a statute, our primary objective is to ascertain and give effect to the Legislature's intent. Tex. Gov't Code Ann. § 312.005 (West 2005); *Molinet,* 356 S.W.3d at 411. "We look first to the statute's language to determine that intent, as we consider it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.' " *Leland v. Brandal,* 257 S.W.3d 204, 206 (Tex.2008) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.,* 996 S.W.2d 864, 866 (Tex.1999)); *see also Molinet,* 356 S.W.3d at 411. We consider the statute as a whole rather than focusing upon individual provisions in isolation. *TGS–NOPEC Geophysical Co. v. Combs,* 340 S.W.3d 432, 439 (Tex.2011). If a statute is unambiguous, we adopt the interpretation supported by its plain language unless such an interpretation would lead to absurd results. *Id.* (citing *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care,* 145 S.W.3d 123 170, 177 (Tex.2004)).*123

Applicable Law

Effective January 1, 2012, the Legislature amended the statutory provisions governing the appointment and use of associate judges in civil cases. *See*Tex. Gov't Code Ann. §§ 54A. 101–.118 (West Supp.2012). Relevant to this appeal is the statutory scheme for seeking review of a decision of an associate judge by the referring court and the impact of any such request for review on the associate judge's decision.

A district court or a statutory county court may refer any civil case or portion of a civil case to an associate judge. *Id.* §§ 54A.101, 54A.106(a). [2]

After hearing a matter, the associate judge is required to notify each attorney participating in the hearing of the associate judge's decision. *Id.* § 54A.111(a). Chapter 54A sets out two separate avenues by which a party, after receiving notice of the associate judge's decision, can seek review of the decision by the referring court.

[2] Any party may object to an associate judge hearing a trial on the merits. *Id.* § 54.106(b)-(c).

First, a party may appeal the associate judge's decision to the referring court. *Id.* §§ 54A.111(b), (e), 54A.117. Unless a party appeals the associate judge's decision to the referring court, the associate judge's decision has the same force and effect as an order of the referring court. *Id.* § 54A.111(a). Except for a decision by the associate judge that issues a temporary restraining order or a temporary injunction, a party may file an appeal of the associate judge's order in the referring court "not later than the seventh day after the date the party receives notice of the decision." *Id.* § 54A.111(b). The appeal is tried de novo in the referring court and is limited to those matters specified in the appeal. *Id.* § 54A.111(e). Except on leave of the referring court, a party may not submit on appeal any additional evidence or pleadings. *Id.* The referring court may modify, correct, reject, reverse, or recommit the issue to the associate judge within thirty days of the associate judge's decision; otherwise, the associate judge's decision becomes the decree of the referring court. *Id.* § 54A.117.

The second avenue for review set out in chapter 54A is a de novo hearing before the referring court. *Id.* §§ 54A.112–.116. A party must file a written request for a de novo hearing with the clerk of the referring court "not later than the seventh working day after the date the party receives notice of the substance of the associate judge's decision." *Id.* § 54A.115(a).[3] The party must specify the issues being presented to the referring court in the de novo hearing and must give notice to opposing counsel of the request. *Id.* § 54A.115(b)-(c). Any other party may file a written request for a de novo hearing within seven working days after the initial request was filed. *Id.* § 54A.115(d). The trial court must hold the de novo hearing within thirty days of when the initial request for a de novo hearing was filed. *Id.* § 54A.115(e). Without leave of court, a party is allowed to present witnesses during the de novo hearing, and the referring court may consider the record from the hearing before the associate judge if the record was taken by a court reporter. *Id.* § 54A.115(f).

[3] A party may not, however, demand a second jury in a de novo hearing before the referring court if the associate judge's proposed order or judgment resulted from a jury trial. *Id.* § 54A.115(h).

While an issue is pending a de novo hearing before the referring court, a proposed order or judgment of the associate judge, except for an order appointing a *124 receiver, is in full force and effect and is enforceable as an order or judgment of the referring court. *Id.*§ 54A.113(a). However, if a request for a de novo hearing is not timely filed or the right to a de novo hearing is waived,[4] the proposed order or judgment of the associate judge becomes the order of the referring court only on the referring court's signing the proposed order or judgment. *Id*§ 54A.113(b).

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[4] Prior to the hearing before the associate judge, a party may, either in writing or on the record, waive its right to a de novo hearing before the referring court. *Id.* § 54A.112(c).

Analysis

In this case, the associate judge issued the turnover order appointing a receiver on January 9, 2012. Pjetrovic received notice of the associate

judge's decision on January 10, 2012. Pjetrovic filed an appeal of that decision on January 17, 2012, within seven days of receiving notice of the decision, but did not file a request for a de novo hearing before the referring court. Relying on section 54A.113(a) of the government code, Pjetrovic argues the associate judge's order appointing a receiver was not in effect on January 13, 2012 when his claims were dismissed. *See id.* § 54A.113(a) (except for order providing for appointment of receiver, proposed order of associate judge is in full force and effect pending de novo hearing before referring court). However, Pjetrovic only appealed the associate judge's order and did not request a de novo hearing. Accordingly, section 54A.113(a) does not apply in this case.

Relying on section 54A.111(a) of the government code, 4HG and the Paynes assert the associate judge's order appointing a receiver was in full force and effect on January 12, 2012 because Pjetrovic had not yet appealed the associate judge's order. *See id.* § 54A.111(a) (associate judge's decision has the same force and effect as order of referring court unless party appeals decision as set out in statute). According to 4HG and the Paynes, the order appointing the receiver was effective from January 9, 2012 until January 17, 2012 when Pjetrovic filed his appeal. It was then not effective until February 9, 2012 when the associate judge's order became the decree of the district court due to the district court's failure to take timely action on the appeal.

We agree with 4HG and the Paynes that the provisions of chapter 54A of the government code relating to an appeal of the associate judge's order without a request for a de novo hearing apply to this case. We cannot, however, agree that the associate judge's order was in effect on January 13, 2012. Section 54A.111(a) provides that the associate judge's decision has the same force and effect as an order of the referring court "unless a party appeals the decision as provided by Subsection (b)." *Id.* § 54A.111(a). As relevant to this case, subsection (b) gave Pjetrovic seven days after the date he received notice of the associate judge's decision in which to file the appeal. *Id.* § 54A.111(b). Pjetrovic timely filed his appeal under subsection (b) and, therefore, section 54A.111(a) was not applicable to give the associate judge's decision the full force and effect of an order of the referring court. To read the statute to allow the associate judge's decision to be effective despite Pjetrovic's timely appeal of the order could very well make the right to appeal meaningless.

We conclude that, in light of Pjetrovic's timely appeal of the associate judge's order, the associate judge's order was not in full force and effect on January 13, 2012. Accordingly, the receiver did not have authority to settle Pjetrovic's claims
125 against *125 4HG and the Paynes on January 13, 2012, and the trial court erred by dismissing the claims based on the receiver's agreement to do so.

We resolve Pjetrovic's sole issue in his favor. We reverse the trial court's dismissal of Pjetrovic's claims against 4HG and the Paynes and remand this case for further proceedings.

No. 98-0130
Supreme Court of Texas

Rhône-Poulenc, Inc. v. Steel

997 S.W.2d 217 (Tex. 1999)
Decided Jul 1, 1999

No. 98-0130.

Argued October 20, 1998.

Decided July 1, 1999.

On Petition for Review from the Court of Appeals for the First District of Texas.

Marie R. Yeates, Houston, Robert L. Le Boeuf, Angleton, Gwen J. Samora, Houston, Bebe H. Kivitz, Michael T. Starczewski, Philadelphia, PA, for Petitioner.

Richard S. London, Pete T. Patterson, John L. Barnes, Houston, for Respondents.

Justice BAKER delivered the opinion of the Court in which Chief Justice PHILLIPS, Justice ENOCH, Justice OWEN, Justice ABBOTT, Justice HANKINSON, Justice O'NEILL and Justice GONZALES joined.

Justice HECHT filed a dissenting opinion.

219 *219

JAMES A. BAKER, Justice.

This summary judgment case involves an alleged latent occupational disease. The sole issue is whether the trial court's case management orders shifted the burden of proof from the movant, Rhône-Poulenc, to the nonmovants, the Steels, in a summary judgment proceeding under Rule 166a(c) of the Texas Rules of Civil Procedure. Because Rule 166a(c) requires a summary judgment movant to prove it is entitled to judgment as a matter of law, we conclude that the orders did not shift the burden from Rhône to the Steels. We also conclude that Rhône's summary judgment evidence did not meet Rule 166a(c)'s burden. Accordingly, we affirm the court of appeals' judgment, albeit for reasons different from those the court of appeals expressed.

I. BACKGROUND

From November 1986 to early 1990, Jeffrey Steel worked at Rhône's Freeport, Texas, rare earths processing facility. At this facility, workers extract rare earth elements from special ores for use in automotive catalytic converters, television picture tubes, and related products. The ores used in the rare earth's separation process contain naturally occurring, 220 *220 low-level radioactive material. During processing, the radioactive material is removed from the ore, drummed, and disposed of under state and federal regulatory requirements. Steel was responsible for filtering out the radioactive material and then drumming the waste. He was also responsible for cleaning the filtration system and storing the residue in sumps after electrical or mechanical failures at Rhône. Every three to four months Steel was responsible for cleaning the sumps, which required him to physically remove the waste in buckets and put it in the drums. Steel asserted that during these activities he was exposed to, splattered with, and sometimes ingested the radioactive waste residue.

On October 6, 1989, a physician diagnosed Steel, at age twenty-eight, with anaplastic oligodendroglioma, a rare form of brain cancer. On September 21, 1992, Steel and his wife, Kenda, sued ninety defendants including Rhône.

The Steels claim that Steel's exposure to various substances while working at Rh~ne caused him to develop brain cancer. Rhône raised the two-year statute of limitations as a defense. The Steels then pleaded the discovery rule and asserted that they did not discover the cause of Steel's injury until September 19, 1990.[1] On this date, Kenda Steel read a newspaper article about companies in Freeport voluntarily agreeing to reduce plant emissions because of pressure from the Environmental Protection Agency. This article referred to "cancer risks" at plants where emission reductions were to take place. Mrs. Steel testified that she first realized that her husband's brain tumor was connected with his work at Rhône when she read the newspaper article.

[1] Because September 19, 1992 fell on a Saturday, the Steels' lawsuit, filed on September 21, 1992, the first Monday after September 19, 1992, was, under Texas Rule of Civil Procedure 4, within two years from September 19, 1990. *See* Tex. R. Civ. P. 4.

In March 1993, the Steels filed an amended petition and asserted claims on behalf of their minor son, Gregory Steel, who died from leukemia on June 22, 1991. The Steels claim that while Jeffrey Steel worked at Rhône, he unknowingly and inadvertently brought radioactive residue home on his clothing and shoes. The Steels asserted that Gregory was thus exposed to these hazardous substances and that as a result, Gregory contracted leukemia and died.

During the litigation, the trial court issued two agreed case management orders. The trial court issued the first order on January 26, 1993. That order required the Steels to provide to all defendants: (1) an affidavit signed by Jeffrey Steel detailing his exposure to specific chemicals; and (2) an affidavit signed by a qualified medical doctor stating the doctor's medical opinion, based on a reasonable degree of medical probability, that exposure to specific chemicals in the manner described in Jeffrey Steel's affidavit, was, for each chemical, a substantial contributing cause of Steel's brain cancer. The doctor's affidavit was also to provide the basis for that doctor's opinion including reliance, if any, upon specific epidemiological, toxicological, or other medical studies.

On April 28, 1993, the trial court signed a second order, which required: (1) a second affidavit by Jeffrey Steel detailing each exposure to specific chemicals that he believed caused his son, Gregory, to receive exposure to such chemicals; and (2) an affidavit by a qualified medical doctor stating the doctor's medical opinion, based on a reasonable degree of medical probability, that exposure to specific chemicals in the manner described in Jeffrey Steel's second affidavit was, for each chemical, a substantial contributing cause of Gregory Steel's leukemia. The doctor's affidavit was also to provide the basis for that doctor's opinion including reliance, if any, upon specific epidemiological, toxicological, or other medical studies.

In response to the orders, the Steels provided
221 Jeffrey Steel's affidavit, including *221 a list of chemicals to which he was exposed and their origin. Initially, rather than an affidavit, the Steels provided a letter from Dr. Daniel Teitelbaum, a clinical toxicologist, which stated that there was a greater probability than not that the radioactive and organic materials to which Jeffrey Steel was exposed in the course of his work at Rhône were the sole cause or contributed substantially to the cause of Jeffrey Steel's brain tumor and Gregory Steel's leukemia.

In October 1994, all defendants, including Rhône, moved for summary judgment. The defendants asserted as grounds for their motion that the Steels could not prove causation for Jeffrey Steel's brain tumor or Gregory Steel's leukemia and that limitations barred Jeffrey Steel's claims against all defendants. The defendants supported their motion

with an affidavit from Stanley M. Pier, Ph.D., an environmental toxicologist, who stated in his affidavit:

> Plaintiffs basically speculate that for some unspecified period of time, Jeffrey and Gregory Steel may have come into contact with a small amount of unknown chemicals, which plaintiffs allege may have caused their diseases, while at the same time selectively ignoring all other factors in cancer causation such as alcohol, tobacco, drugs and diet, for example. Essentially, plaintiffs attempt to take an unknown exposure to unknown quantities of unknown chemicals and opine causation with a reasonable medical certainty. This flaunts all processes of scientific reasoning.
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> . . . .
>
> Before a physician/scientist/plaintiff can state that a known carcinogen can cause or has caused a given cancer, the plaintiff/physician/scientist must have a definition of the substance involved and the characteristics of the exposure . . . . Absent chemical or exposure information, no physician/scientist/plaintiff can possibly establish a medical link within a reasonable certainty, between a carcinogenic agent and a particular cancer.

In response to the defendants' motions for summary judgment, the Steels provided Dr. Teitelbaum's affidavit, Kenda Steel's affidavit, and the September 19, 1990 article linking chemicals from work sites to cancer. In February 1995, the trial court granted summary judgment for all defendants except Rhône. The trial court's order stated that limitations barred all the Steels' claims by and through Jeffrey Steel, and that all the Steels' claims by and through Gregory Steel failed for want of medical causation.

Rhône again moved for summary judgment asserting that limitations barred the damages claims derivative of Jeffrey Steel's own claims, limitations barred claims for Gregory Steel's death, and there was no competent summary judgment evidence of exposure or causation that raised a fact issue on the cause of Gregory Steel's death. The Steels responded, attaching their original response to the original motion, a second affidavit from Dr. Teitelbaum, and other documents.

Those defendants who had previously received summary judgment moved for severance. The trial court initially granted a severance, but subsequently rescinded the severance order, granted Rhône's motion for summary judgment, and rendered a final judgment disposing of the Steels' claims against all defendants. The judgment stated that the court ruled that limitations barred the Steels' claims against all defendants. The judgment further stated that the Steels waived their right to appeal the earlier judgment against all defendants, except Rhône, and that the appellate time limits had run on those defendants. Consequently, the Steels appealed only their claims against Rhône.

In the court of appeals, the Steels asserted that the trial court erred in granting Rhône summary judgment on limitations. The Steels argued that the discovery rule tolled limitations on Jeffrey
222 Steel's claims and a genuine material *222 fact issue existed about the date the Steels discovered their injuries. Rhône argued that Jeffrey Steel's injury was not inherently undiscoverable because he knew of the nature of his injury on October 6, 1989, when he was diagnosed with a brain tumor and knew he had previously worked with chemicals. Therefore, the discovery rule did not apply in that limitations was tolled only until October 6, 1989, at the latest. The court of appeals held that the discovery rule did apply to Jeffrey Steel's injury and that Rhône did not negate the discovery rule by proving as a matter of law when Jeffrey Steel should have discovered the nature of

his actionable injury. The court of appeals concluded that a material fact issue remained about when Jeffrey Steel should have reasonably discovered the nature of his injury. 962 S.W.2d 613, 620

The Steels also asserted that they raised a material fact issue on the cause of Jeffrey Steel's brain tumor and Gregory Steel's leukemia. Rhône challenged the competency and admissibility of the Steels' affidavits. Rhône asserted that Jeffrey Steel's affidavit was conclusory and inadmissible hearsay and that Dr. Teitelbaum's affidavit was incompetent because it was based on inadmissible hearsay and not personal knowledge. The court of appeals held that Jeffrey Steel's statement that the chemicals and waste contributed to his son's death was not based on his personal knowledge, but was conclusory and, therefore, not competent summary judgment evidence. The court of appeals concluded that Jeffrey Steel's statement about his job responsibilities, the processes and chemicals involved in his job activities, and how radioactive substances came into contact with his skin and clothing were competent summary judgment evidence. The court of appeals also concluded that Dr. Teitelbaum's affidavit was competent summary judgment evidence to controvert Dr. Pier's affidavit. The court of appeals concluded that the Teitelbaum affidavit raised material fact issues about Jeffrey and Gregory Steels' specific exposures to chemicals and the causal connection between those exposures and their deaths. Accordingly, the court of appeals reversed the trial court's summary judgment and remanded the cause for further proceedings.

Rhône petitioned this Court for review, asserting that the case management orders shifted the burden of proof from Rhône as the movant to the Steels as the nonmovants and that the Steels failed to present competent summary judgment evidence to raise a fact issue on limitations and causation. Specifically, Rhône argues that: (1) limitations bars Jeffrey Steel's claims because he admittedly learned of his injury more than two years before the Steels filed suit; (2) the discovery rule does not apply to Jeffrey Steel's claims; (3) even if the discovery rule applies to Jeffrey Steel's claims, those claims are still barred by limitations; and (4) the Steels did not raise a material fact issue about causation on Gregory Steel's leukemia.

II. SUMMARY JUDGMENT A. Burden of Proof

Rule 166a provides a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine fact issue. *See Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex. 1972). The party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c);[2] *Wornick Co. v. Casas,* 856 S.W.2d 732, 733 (Tex. 1993); *Nixon v. Mr. Property Mgt. Co.,* 690 S.W.2d 546, 548 (Tex. 1985); *Cavillo v. Gonzalez,* 922 S.W.2d 928, 929 (Tex. 1966). The nonmovant has no burden to respond to a summary judgment motion unless the
223 movant *223 conclusively establishes its cause of action or defense. *See Oram v. General Am. Oil Co.*, 513 S.W.2d 533, 534 (Tex. 1974); *Swilley*, 488 S.W.2d at 67-68. The trial court may not grant summary judgment by default because the nonmovant did not respond to the summary judgment motion when the movant's summary judgment proof is legally insufficient. *See City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 (Tex. 1979). The movant must establish its right to summary judgment on the issues expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense as a matter of law. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *Centeq Realty, Inc. v. Siegler,* 899 S.W.2d 195, 197 (Tex. 1995); *City of Houston*, 589 S.W.2d at 678.

[2] Rhône filed its motion for summary judgment before September 1, 1997, the effective date of Rule 166a(i). *See* Tex. R. Civ. P. 166a(i).

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. *See Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997). When the plaintiff pleads the discovery rule as an exception to limitations, the defendant must negate that exception as well. *See Velsicol*, 956 S.W.2d at 530; *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990); *Woods v. William M. Mercer, Inc.,* 769 S.W.2d 515, 518 n. 2. (Tex. 1988).[3]

[3] However, the rule is to the contrary in a trial on the merits. The party seeking the benefit of the discovery rule to avoid limitations has the burden of pleading and proving the discovery rule in a trial on the merits. *See Woods*, 769 S.W.2d at 518.

B. Standard of Review

Summary judgments must stand on their own merits. Accordingly, on appeal, the nonmovant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment. *See City of Houston*, 589 S.W.2d at 678. When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant. *See Science Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 911 (Tex. 1997); *Friendswood Dev. Co. v. McDade Co.,* 926 S.W.2d 280, 282 (Tex. 1996); *Wornick*, 856 S.W.2d at 733. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See Science Spectrum, Inc.*, 941 S.W.2d at 911; *Friendswood Dev. Co.*, 926 S.W.2d at 282; *Wornick,* 856 S.W.2d at 733; *Nixon,* 690 S.W.2d at 548-49. On appeal, the movant still bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See Nixon*, 690 S.W.2d at 548.

III. ANALYSIS

Rhône presents four issues to this Court: (1) whether limitations bars Jeffrey Steel's claims because he admittedly learned of his injury more than two years before the Steels filed suit; (2) whether the discovery rule applies to Jeffrey Steel's claims; (3) if the discovery rule applies to Jeffrey Steel's claims, whether those claims are barred under the discovery rule; and (4) whether the Steels raised a material fact issue about causation on Gregory Steel's leukemia.

Rhône concedes that, ordinarily, as the movant for summary judgment on limitations grounds, it would have the burden to prove that the discovery rule does not apply to Jeffrey Steel's claims, or if it does apply, to negate the discovery rule. But Rhône argues that the first agreed case management order shifted the burden of raising a fact issue on limitations and on the discovery rule to the Steels. Rhône contends that this case is not in the posture of a pre-September 1997 summary judgment motion on the causation element, when a defendant must have conclusively negated that element of a plaintiff's cause of action. Additionally, Rhône contends that the second agreed case management order shifted the burden of raising a material fact issue on the causation
224 element to *224 the Steels. Rhône asserts that the burden the Steels assumed is much like the burden every plaintiff now faces when opposing a "no evidence" summary judgment motion under recently amended Texas Rule of Civil Procedure 166a(i). We disagree.

First, Rule 166a(c) governs Rhône's summary judgment motion. *See* Tex. R. Civ. P. 166a(c). Rule 166a(c) clearly requires that Rhône, as the moving party, has the burden to establish that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Cavillo,* 922 S.W.2d at 929. Second, neither of the agreed case management orders facially purports to shift the burden of raising fact issues on limitations, the discovery rule, or causation to the Steels. The Steels only agreed to and the orders only obligated them to provide, on a day certain, the affidavits described above. We conclude that neither case management order served to shift the burden of proof under Rule

166a(c). Accordingly, Rhône has the burden to conclusively establish limitations, conclusively establish that the discovery rule does not apply to Jeffrey Steel's claims, conclusively negate the discovery rule if it does apply, and conclusively establish that there is no causation between Jeffrey Steel's exposure and Gregory Steel's leukemia. *See Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). Consequently, we consider whether Rhône's motion for summary judgment and its supporting summary judgment evidence meets its burden as it pertains to the issues Rhône raises.

In its amended motion for summary judgment, Rhône relied solely on Dr. Pier's affidavit, which Rhône filed in support of its first summary judgment motion. Dr. Pier's affidavit is limited to challenging the competency and admissibility of the Steels' affidavits and Dr. Teitelbaum's opinion letter.[4]

> 4 We note that Dr. Pier's affidavit does not challenge Dr. Teitelbaum's later-filed affidavits.

We conclude, as Rhône conceded in oral argument, that Dr. Pier's affidavit does not prove as a matter of law that it was not objectively verifiable that there was a causal link between Jeffrey Steel's brain tumor and his exposure to radioactive materials at Rhône's facility. Consequently, Rhône did not carry its summary judgment burden because its summary judgment evidence did not prove as a matter of law that the discovery rule does not apply in this case.

Because we conclude that Rhône did not conclusively prove that the discovery rule does not apply, we assume, but do not decide, that the discovery rule applies for purposes of determining whether Rhône negated the discovery rule as a matter of law. *See Science Spectrum, Inc.*, 941 S.W.2d at 911; *Wornick*, 856 S.W.2d at 733; *Nixon,* 690 S.W.2d at 548-49. The parties assume, for purposes of this appeal, that Jeffrey Steel's brain tumor is a latent occupational disease. We likewise assume, but do not decide, the same fact for purposes of this appeal. Therefore, to sustain its burden of proof, Rhône was required to offer summary judgment evidence to show, as a matter of law, that, before September 19, 1990, the Steels knew or in the exercise of reasonable diligence should have known that Jeffrey Steel's brain tumor was likely work-related. *See Childs v. Haussecker,* 974 S.W.2d 31, 33 (Tex. 1998). Rhône offered no such evidence. Consequently, a fact question exists about whether the Steels knew or should have known before September 19, 1990, through the exercise of reasonable diligence, that the brain tumor was likely work-related. Accordingly, the court of appeals correctly determined that Rhône
225 was not entitled to summary *225 judgment on Jeffrey Steel's claims on limitations grounds.

Finally, Rhône had to negate the causation element on Gregory Steel's leukemia by establishing that no genuine issue of material fact existed about whether Gregory Steel's alleged exposure to the radioactive materials his father brought home caused Gregory to contract leukemia and die from that disease. *See Wornick*, 856 S.W.2d at 733. As Rhône recognizes, Dr. Pier's affidavit does not contain any summary judgment evidence that would establish, as a matter of law, that there is no causal connection between Gregory Steel's leukemia and the radioactive materials Jeffrey Steel carried home from Rhône's Freeport facility. Furthermore, the Steels, as the nonmovants, needed no answer or response to Rhône's motion to contend that Rhône did not carry its summary judgment burden. *See City of Houston*, 589 S.W.2d at 678. Consequently, we conclude that Rhône did not carry its summary judgment burden to disprove causation as a matter of law.

IV. CONCLUSION

We hold that the trial court's case management orders did not shift the Rule 166a(c) summary judgment burden from Rhône, the movant, to the Steels, the nonmovants. We hold that Rhône did not carry its summary judgment burden to prove

as a matter of law that limitations barred Jeffrey Steel's claims or that Jeffrey Steel's exposure to radioactive materials at Rhône's Freeport facility did not cause Gregory Steel's leukemia. Accordingly, we affirm the court of appeals' judgment.

NATHAN L. HECHT, Justice, dissenting.

I respectfully dissent. Plaintiffs agreed to pretrial orders requiring them to produce, by a specified date, a qualified medical doctor's affidavit stating that Jeffrey Steel's claimed exposure to chemicals at work was, in reasonable medical probability, a substantial contributing cause of his brain cancer and his son's leukemia, and stating the basis for that opinion. Without such evidence plaintiffs cannot prevail on their claims against Rhône-Poulenc. Plaintiffs did not produce an affidavit within the time agreed. The orders stated that the parties could move for modifications or for further pretrial orders. Plaintiffs did not do so. Plaintiffs later presented a physician's affidavit in response to Rhône-Poulenc's motion for summary judgment that contained the required opinion regarding causation but offered no basis for it.

In *Koslow's v. Mackie*, we held that a trial court can strike a party's pleadings for disobeying a pretrial order under Rule 166 of the Texas Rules of Civil Procedure.[1] The district court in the present case did not impose this sanction on the plaintiffs. It allowed plaintiffs to present a physician's affidavit in response to Rhône-Poulenc's motion for summary judgment. But because this affidavit did not state a reliable basis for the physician's opinion — evidence that the plaintiffs had agreed to produce, that the pretrial orders required, and that is essential to their claims — the district court granted summary judgment for Rhône-Poulenc. The Court holds that the district court impermissibly shifted the summary judgment burden by relieving Rhône-Poulenc of its burden to disprove an element of the plaintiffs' claims, and by placing on the plaintiffs the burden of raising a fact issue. Assuming the Court is correct, I fail to see how the plaintiffs were harmed when the district court was fully authorized by Rule 166 to strike the plaintiffs' pleadings and dismiss their claims outright without allowing their belated efforts to produce the necessary evidence. Plaintiffs' failure to comply with the agreed pretrial orders was not
226 technical, *226 inadvertent, or otherwise excusable; rather, they were unable to produce essential evidence in support of their claims even long after they had agreed to do so. In these circumstances, I would hold that the district court's dismissal of plaintiffs' claims was not reversible error.

1 796 S.W.2d 700, 703-705 (Tex. 1990).

No. D-3826
Supreme Court of Texas

Rogers v. Ricane Enterprises, Inc.

884 S.W.2d 763 (Tex. 1994)
Decided Jun 15, 1994

No. D-3826.

Argued January 18, 1994.

Decided June 15, 1994. Rehearing Overruled November 3, 1994.

Appeal from 286th District Court, Cochran
764 County, James K. Waller, J. *764

Robert P. Baxter, Jr., Dallas, Richard L. Husen, Levelland, Dan Hook, Levelland, for petitioners.

Charles C. Self, Abilene, A. Andrew Gallo, Houston, Robert E. Motsenbocker, Odessa, S. Clinton Nix, Abilene, Dennis R. Burrows, Patrick Helton, Lubbock, C. Medford Owen, Jr., C.H. (Hal) Brockett, Jr., Tom Scott, Eric L. Lindstrom, Midland, Thomas C. McClellan, Dallas, Dave Caddell, Abilene, Warren G. Tabor, Jr., Levelland, John S. Lowe, Walter G. Pettey, III, Stephen G. Gleboff, Dallas, for respondents.

ENOCH, Justice, delivered the opinion of the Court in which PHILLIPS, Chief Justice, and GONZALEZ, HECHT, and CORNYN, Justices, join.

This case involves a trespass to try title action among various parties asserting ownership to a partial assignment of an oil and gas lease. The trial court rendered judgment that the Petitioners take nothing and the court of appeals affirmed, concluding that the assignee had abandoned the purpose of the oil and gas lease in question. 852 S.W.2d 751. We reverse the judgment of the court of appeals.

I.

The trespass action began when Lavina Rogers and others (Rogers), claiming as shareholders of defunct Western Drilling Company (Western), sued Ricane Enterprises and others (Ricane) to recover possession of a working interest under a partial assignment of a larger oil and gas leasehold estate. In May 1937, Carrie Slaughter Dean, lessor, entered into an oil and gas lease with lessee P.N. Wiggins. The lease covered approximately 7,893 acres (base lease). The lease contained a habendum clause providing that Wiggins was "TO HAVE AND TO HOLD [the 7,893 acres] . . . for a term of ten (10) years from [May 31, 1937,] . . . the primary term, and as long as oil and gas . . . is produced. . . ." The lease also provided that if the leased premises "shall hereafter be owned in the severalty or in separate tracts, the premises, nevertheless shall be developed . . . as one lease. . . ." The lessee achieved production within the primary term and subsequently assigned the base
765 lease to Superior Oil Company ("Superior"). *765

In June of 1949, Superior assigned 329.3 acres of the base lease, on which there was no production, to Western. The assignment noted that the conveyance would terminate and revert to Superior unless Western commenced actual drilling within thirty days. Western also agreed to assume all express and implied base lease obligations. Western immediately drilled and completed a well. The well was marginally productive and ceased production in July of 1961. Western and its shareholders did not drill any wells on the tract from 1961 to the present.

In August of 1960, before the well ceased production, Western's president, E.P. Campbell, signing in his personal capacity, conveyed all his rights to the 329.3 acres to the Dakota Company, Inc. In return, Dakota gave Campbell a promissory note and deed of trust which Campbell transferred to Union Bancredit Corporation. Union Bancredit purported to foreclose on the 329.3 acres when Dakota defaulted on the note. Union Bancredit subsequently assigned the 329.3 acres to Harry Allred, a majority shareholder of the Torreyana Oil Corporation. Torreyana successfully completed a new producing well on the property in October 1979 and is a part of the Ricane group.[1]

[1] In 1983 Harry Allred assigned his interest to Meyer-Moritz Company. Meyer-Moritz sold part of its interest to Argonaut Energy Corp. (now Brock Resources, Inc.) and the remainder to Cordova Resources, Inc. (now Willbros Energy Services Co.), both of which are part of the Ricane group as well.

Campbell died in 1961, and in 1965 the State of Texas forfeited Western's corporate charter due to nonpayment of franchise taxes. In 1984, Rogers brought a trespass to try title action against Ricane, seeking to recover possession of the working interest under the partial assignment of the base lease. They also sought damages from various members of the Ricane group for conversion of oil and casinghead gas produced or purchased from the properties.

The trial court granted summary judgment in Ricane's favor, finding that the lease automatically terminated because: 1) of cessation of use; 2) the property was abandoned; 3) of laches; and, 4) of the statute of limitations. The court of appeals affirmed on the cessation of use theory. 775 S.W.2d 391. This Court concluded that the assignment language in question created a covenant, not a condition, and that breach of that covenant could not have resulted in automatic termination of Western's rights. *See Rogers v. Ricane Enterprises, Inc.,* 772 S.W.2d 76 (Tex. 1989) (*Ricane I*). Thus, we reversed the summary judgment and remanded the case for trial on the merits. *Id.*

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On retrial, the trial court rendered a take nothing judgment in the trespass to try title and conversion claims. The court of appeals affirmed after concluding that the lease had terminated based on the jury's finding of abandonment of purpose. 852 S.W.2d 751. Rogers argues that the court of appeals erred in its holding because this Court in *Ricane I* held, as a matter of law, that the assignment had not terminated, thereby implicitly rejecting the *Davis* doctrine. *See Texas Co. v. Davis,* 113 Tex. 321, 254 S.W. 304 (1923) (calling for automatic termination of lease after the purpose of lease has ceased or has been abandoned). Ricane responds that the assignment automatically terminated under the terms of the assignment instrument itself or pursuant to the *Davis* doctrine.

II.

First, we address whether the assignment terminates pursuant to the terms of the assignment instrument. In *Ricane I,* this Court specifically addressed paragraphs 1 and 2 of the assignment. *Ricane I,* 772 S.W.2d at 79. The parties acknowledged that the provisions of paragraph 1 had been satisfied, and we held that a violation of paragraph 2 would not result in automatic termination of the property interest. *Id.*

In this appeal, we are now pointed to paragraphs 5 and 7 of the assignment instrument. They state:

5.

> In the event that production of oil, gas or other hydrocarbon substances is developed on the above described leased premises by Western, and Western desires to abandon or cease operating the same, Western shall

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> notify Superior in writing of such desire, and Superior may, at its election, require Western to transfer and assign to Superior [the holder of the base lease] or to its nominee all of Western's right, title and interest inland[sic] to said lease, together with the well or wells located thereon and together with such equipment used in connection therewith which Superior may desire to acquire.
>
> . . . . . 7.
>
> Upon termination of the rights of Western hereunder and/or with respect to the above described lease, as herein and in said lease expressly provided, or otherwise, Western shall deliver to Superior upon demand, a good and sufficient quit-claim deed and release. Any delay, failure or refusal on thepart [sic] of Western to deliver any such quit-claim and release shall in no way prevent such rights from terminating, and reverting to and revesting in Superior as herein expressly provided and contemplated. . . .

Ricane argues that by reading paragraphs 5 and 7 together, it becomes evident that the assignment terminated because of Western's failure to transfer the assigned premises back to the holder of the base lease.

We disagree. Paragraph 7 is only triggered upon failure of some other provision leading to termination of Western's rights. Western met the only condition in the assignment which could lead to automatic termination of the assignment by drilling an initial well within thirty days. *Ricane I,* 772 S.W.2d at 79; *see also Colby v. Sun Oil Co.,* 288 S.W.2d 221, 225 (Tex.Civ.App. — Galveston 1956, writ ref'd n.r.e.) (noting that the general rule that mineral leases are construed more strongly against the lessee and in favor of the lessor does not apply to the construction of forfeiture provisions). The assignment did not automatically terminate under its own terms.

III.

Next, we address whether *Davis,* 254 S.W. 304, applies here. In *Davis,* a lease contained a clause which made the lease void, leading to forfeiture, if drilling did not commence within two years. *Id.* 254 S.W. at 304-05. The lease contained no stated term for its existence, but provided that the conveyance was made for "the purpose of drilling, mining and operating for minerals," and that in the event oil or other minerals were discovered, the conveyance would be "in full force and effect for twenty-five years from the time of the discovery of such product, and *as much longer as* oil, water, gas or other minerals can be produced in paying quantities." *Id.* at 305 (emphasis added). Drilling began within two years, but all production on the property ceased and all drilling equipment and machinery were subsequently removed from the premises during the twenty-five year period referenced in the lease. This caused Davis, the lessors' assignee, to sue Texas Company, the lessee's assignee, for recovery of the lease on the basis that the condition of drilling had not been satisfied. *Id.* at 306.

This Court concluded that: 1) the lease in question conveyed a determinable fee, and 2) the purpose of the lease was the production of oil and gas.[2] *Id.* at 306. The Court noted that once the drilling condition was met, title to the minerals vested, but only for the purpose specified — for the exploration, development and production of minerals. When the lessee ceased using the land for the stated purpose, the estate instantly terminated. *Id.* at 307-308. *Davis* stands, therefore, for the proposition of law that, if the expressed purpose of the lease is the production of minerals, and the grantee "entirely and permanently stopped and abandoned the exploration and development" of the property in question, then the estate terminates at once and title reverts to the grantor. *Id.* at 309. *767

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[2] Black's Law Dictionary 554 (5th ed. 1979) defines a determinable fee as a property interest which is burdened by a provision

in the conveyance providing for automatic expiration of the estate upon occurrence of an operative event, an event which may or may not occur. *See also Big Lake Oil Co. v. Reagan County,* 217 S.W.2d 171, 173 (Tex.Civ.App. — El Paso 1948, error ref'd) (noting that a determinable fee is one that may never be terminated or that may be terminated in accordance with the law under which the conveyance was created).

This Court elaborated on *Davis* in *W.T. Waggoner Estate v. Sigler Oil Co.,* 118 Tex. 509, 19 S.W.2d 27, 29 (1929). Noting that like the lease in *Davis,* the Waggoner lease contained a clause that limited the duration of the lease to "as much longer as oil or gas was produced," this Court expressed concern that there not be any confusion between the theories of abandonment of title and of *cessation of use* of an oil and gas lease recognized in *Davis*. *Id.* at 30-32. These are two separate doctrines. Although we do not recognize abandonment of title in Texas, *see Ricane I,* 772 S.W.2d at 80, the *Davis* doctrine has been repeatedly affirmed. *See Fox v. Thoreson,* 398 S.W.2d 88, 91 (Tex. 1966); *Chandler v. Drummet,* 557 S.W.2d 313, 315-16 (Tex.Civ.App. — Houston [1st Dist.] 1977, writ ref'd n.r.e.); *see also Mon-Tex Corp. v. Poteet,* 118 Tex. 546, 19 S.W.2d 32 (1929).

Contrary to Rogers's claim, in *Ricane I* we did not implicitly overrule *Davis.* [3] The assignment in this case does not, by its express terms, specify a purpose for the assignment and does not contain any language limiting the duration of the assignment to "as long as" oil and gas is produced. Therefore, *Davis* does not control, and the jury's answer regarding abandonment of purpose is immaterial.

[3] Rogers, alternatively, has argued that in *Dallas Power Light Co. v. Cleghorn,* 623 S.W.2d 310 (Tex. 1981), this Court limited the *Davis* doctrine to unusual or "no term" leases that are still in the primary or exploratory terms. That case did not limit the doctrine as Rogers claims. The leases in that case provided for delay rental payments in lieu of production. *Id.* 254 S.W. at 311. Consequently, this Court concluded that the leases in question expressed an intent contrary to abandonment through cessation of production. *Id.* Thus, *Davis* was not implicated.

Ricane, alternatively, points out that the base lease contains determinable fee language and the assignment incorporates the base lease obligations. Resort to the provisions of the base lease, though, does not lead to automatic termination of the assigned portion upon cessation of production. The base lease contains a clause stating that if "the leased premises shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as a single lease. . . ." Consequently, production from part of the lease saves the entire base lease, including the assigned portion. Thus, the production on the other parts of the base lease would have saved the assignment and prevented its termination. *See e.g., Shuttle Oil Corp. v. Hamon,* 477 S.W.2d 701 (Tex.Civ.App. — Beaumont 1972, writ ref'd n.r.e.); *Dacamara v. Binney,* 146 S.W.2d 440 (Tex.Civ.App. — San Antonio 1940, writ dism'd judgmt cor.). The assignment instrument is what governs the rights of Rogers and Ricane.

Ricane, additionally however, argues that there is an *implied* determinable fee in the assignment. We decline to infer such language from the assignment instrument. *See Ricane I,* 772 S.W.2d at 79 (the language used by the parties . . . will not be held to impose a special limitation on the grant unless it is clear and precise and so unequivocal that it can reasonably be given no other meaning); *see also Waggoner,* 19 S.W.2d at 32 (noting that courts should not find that a lease has been forfeited or terminated upon breach of an implied obligation); *see e.g., Foster v. L.M.S. Dev. Co.,* 346 S.W.2d 387, 394 (Tex.Civ.App. — Dallas 1961, writ ref'd n.r.e.) (stating that a promise of an

obligee will be construed as a covenant unless an intention to create a conditional estate is clearly and unequivocally revealed by the language of the instrument).

Even if we were to imply a drilling purpose in the assignment, we reject the notion that automatic termination would be the resulting remedy. The appropriate remedy would be an action for breach of that implied covenant, or a conditional decree of cancellation allowing the parties to fulfill the purpose of the assignment by drilling to avoid losing the assignment. *See Ricane I,* 772 S.W.2d at 79; *Waggoner,* 19 S.W.2d at 29-32. *Waggoner* specifically states that the:

> usual remedy for breach of lessee's implied covenant for reasonable development of oil and gas is an action for damages, though, under extraordinary circumstances — where there can be no other adequate relief — a court of equity will entertain an

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> action to cancel the lease in whole or in part.

Id. 19 S.W.2d at 29; *see also* Ernest E. Smith Jacqueline Lang Weaver, 1 TEXAS LAW OF OIL AND GAS 254-55 (1993) (discussing remedies for breach of implied covenant of reasonable development and noting that Texas courts have consistently followed *Waggoner* and generally refuse to grant lease cancellation). Furthermore, the proper party to bring such an action would be Superior, the assignor. We need not further elaborate on Superior's entitlement to such remedies because it is not a party to the present action.

IV.

Having determined that *Davis* does not control in this case and that the assignment did not automatically terminate by its own terms, we now determine who prevails under trespass to try title principles. Because both parties claim they ultimately derived their title from Western, the relevant question is whose title is superior — that of Rogers or that of Ricane.

A trespass to try title action is a procedure by which claims to title or the right of possession may be adjudicated. *Yoast v. Yoast,* 649 S.W.2d 289, 292 (Tex. 1983). To recover in a trespass to try title action, the plaintiff must recover upon the strength of his own title. *Hunt v. Heaton,* 643 S.W.2d 677, 679 (Tex. 1982); *Land v. Turner,* 377 S.W.2d 181, 183 (Tex. 1964). The plaintiff may recover (1) by proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession, and that the possession has not been abandoned. *Turner,* 377 S.W.2d at 183.

Ricane concedes that the second means of establishing title is at issue here. Generally by this means, Rogers, as the plaintiff, may prove a prima facie case by connecting its title and Ricane's title through complete chains of title to the common source and then by showing that its (Rogers's) title is superior. *Adamson v. Doornbos,* 587 S.W.2d 445, 447 (Tex.Civ.App. — Beaumont 1979, no writ) (*citing Jones v. Mid-State Homes, Inc.,* 163 Tex. 229, 356 S.W.2d 923, 924 (1962)). However, because Ricane has asserted that its title derives from the same source as Rogers's title, Rogers, as plaintiff, need only demonstrate good title coming from that common source to meet its burden of proof. *See United States v. Denby,* 522 F.2d 1358, 1362 (5th Cir. 1975).

Rogers claims to have obtained the assets of Western, including the property interest in question, by virtue of its status as the shareholders of Western. To prevail, Rogers must show that, at the time Western lost its corporate charter, Western had good title to the land. Additionally, because the forfeiture of Western's charter to the State caused Western to cease being a legal entity,

we must determine what interest, if any, Western's shareholders had in the corporation's assets, including the leasehold interest.

In Question 1 the jury found that Western, "at all times since at least 1960 and . . . at the present time [has been] the owner of all or part of the title."[4] When Western's charter was forfeited, a lien on Western's property was available to the State to satisfy Western's liability to the State. *See* TEX.CIV.STAT.ANN. art. 1302-5.07 (Vernon 1961). However, there is no evidence that the State executed on that lien with respect to the assignment. Rogers, as Western shareholders, held equitable title to the property owned by Western in trust for Western's creditors. *See Humble Oil Refining Co. v. Blankenburg,* 149 Tex. 498, 235 S.W.2d 891, 893 (1951); *Houston v. Shear,* 210 S.W. 976, 981 (Tex.Civ.App. — Austin 1919, writ dism'd).

[4] We note that in Question 3 the jury found that since 1960, Western owned only a one-third fractional working interest.

Where the plaintiffs in a trespass to try title case show title to an undivided interest in property, they are entitled to judgment as to the entire tract, unless the defendant shows title to some interest in the land or a right to possession of the land. *Steddum v. Kirby Lumber Co.,* 110 Tex. 513, 221 S.W. 920, 922 (1920). Because Ricane has failed to show valid title to any part of the assignment, as discussed below, this finding by the jury is immaterial.

It appears that Keith W. Cecil, Jr., a director and
769 shareholder of Western, either *769 was appointed or volunteered to wind up Western's affairs. He testified that his goal was to pay off Western's creditors. He further testified that Western had difficulty paying off its creditors after E.P. Campbell's death and after the State's forfeiture proceedings. But, neither he nor anyone else testified as to the fate of the property interest following forfeiture of Western's charter. Ricane relies on this insolvency to support its claim that any interest Western's shareholders may have had with regard to the assignment disappeared following the forfeiture of Western's charter. However, there has been no showing that a transfer of title occurred. Western's alleged insolvency is insufficient to defeat the title claimed by Western's shareholders.[5]

[5] Some members of the Rogers group claim rights to the assignment through inheritance of stock held by Campbell rather than by virtue of being original shareholders. Had the 1960 instrument Campbell executed purported to warrant title, then Campbell's conduct might estop his heirs from asserting claims against Ricane as grantees. *See Clark v. Gauntt,* 138 Tex. 558, 161 S.W.2d 270, 271-72 (1942). However, as discussed below, because Campbell's conveyance was only by quitclaim and transferred only whatever "right, title and interest" *he* had in 1960, Campbell's heirs have a claim to their proportionate share of the land in question. *See Roberts v. Corbett,* 265 S.W.2d 127 (Tex.Civ.App. — Galveston 1954, writ ref'd) (noting that doctrine of after-acquired title does not apply to quitclaim deed).

Ricane responds that Campbell's 1960 transfer to Dakota and its subsequent transferees was binding on Western, thereby making Ricane's title superior to Western's shareholders' title. *See Curdy v. Stafford,* 88 Tex. 120, 30 S.W. 551, 552 (1895) (noting that absent special provisions in the conveyance that defeats it, earlier title emanating from the common source is the better title and is given prevailing effect). In determining whether Campbell transferred Western's property interest to Dakota, we must consider the instrument in its entirety. *See Cook v. Smith,* 107 Tex. 119, 174 S.W. 1094, 1095 (Tex. 1915).

The deed stated that E.P. Campbell granted, conveyed, sold, assigned, and transferred to Dakota "all of the right title and interest . . . as conveyed to [him] by Assignments of record [including conveyance of] all of [his] right, title

and interest . . . in [the base lease] . . . insofar as said lease covers the . . . 329.3 acres. . . . subject to the exceptions, reservations and provisions . . . stated, but all without warranty of any kind, either expressed or implied." This is the essence of a quitclaim deed. *See* BLACK'S LAW DICTIONARY 1126 (5th ed. 1979) (a quitclaim deed is a deed of conveyance intending to pass any title, interest or claim of the grantor, but not professing that such title is valid, nor containing any warranty or covenants for title); *Porter v. Wilson,* 389 S.W.2d 650, 655-56 (Tex. 1965); *Cook,* 174 S.W. at 1095-96. A quitclaim deed is not a conveyance or a muniment of title. *Adamson,* 587 S.W.2d at 447-48. By itself, it does not establish any title in those holding the deed, but merely passes the interest of the grantor in the property. *Id.* Campbell gave Dakota only whatever title he individually had. Having no title to the property interest in question, Campbell passed no title.[6]

[6] Because of the language in the deed from Campbell to Dakota, Ricane urged in the trial court that there was a lost deed transferring title to the assignment from Western to Campbell. Question 12 asked the jury whether it found "that it is more reasonable than not that there is a lost deed between Western Drilling Company, Inc. as grantor and E.P. Campbell as grantor pertaining to the Subject Property?" The jury answered: "No."

Ricane urges, however, a "reverse alter ego doctrine" theory to hold Western liable for Campbell's conveyance to Dakota. *See e.g., Zahra Spiritual Trust v. United States,* 910 F.2d 240 (5th Cir. 1990) (applying Texas law and recognizing reverse alter ego theory). Because Campbell executed the instrument in his personal capacity, and the instrument itself does not reflect that Campbell purports to act on behalf of Western, the reverse alter ego theory does not apply. Alternatively, Ricane claims that it has title because the jury found that Western ratified Campbell's act, either through inaction or acquiescence. However, there is no evidence in support of the jury's finding. Even if Western had actual or constructive knowledge of Campbell's
770 assignment to Dakota, *770 Campbell executed the instrument in his individual capacity and the instrument itself does not purport to convey any interest belonging to Western. There is no ratification here.

Finally, Ricane claims to have obtained title by virtue of division orders executed by Superior, holder of the base lease, purporting to recognize Ricane's interest in the assigned portion of the lease. The fact that Superior purportedly recognized that Ricane had an interest in the lease by its division orders does not transfer title of the lease to Ricane. While a division order can create a contractual relationship, it does not transfer title. *See Chicago Corp. v. Wall,* 156 Tex. 217, 293 S.W.2d 844, 846-47 (1956); *Thompson v. Thompson,* 149 Tex. 632, 236 S.W.2d 779, 786 (1951); *Padgett v. Padgett,* 309 S.W.2d 262, 266-67 (Tex.Civ.App. — Austin 1957, writ ref'd n.r.e.). The division orders do not replace or invalidate the original assignment. *See e.g., Gavenda v. Strata Energy, Inc.,* 705 S.W.2d 690, 691 (Tex. 1986); *Williams v. Baker Exploration Co.,* 767 S.W.2d 193, 196 (Tex.App. — Waco 1989, writ denied). Ricane cannot establish title by means of the division orders.

As part of its argument, Ricane claims that Superior regained title to the assigned portion of the lease because it exercised its right of termination through two letters sent in 1966 noting Western's cessation of production and demanding a reassignment. We have already noted that the assignment did not terminate automatically. Regardless of the right to demand reassignment, Superior had to sue to enforce any rights it had. This it has not done.

With Rogers having established its title through Western, and Ricane having failed to overcome Rogers's claim with proof of superior title, title quiets in the Rogers group.

For the reasons stated, we reverse the judgment of the court of appeals and render judgment quieting title in Rogers. Further, we remand to the court of appeals for consideration of the points it did not reach, including the conversion issues.

HIGHTOWER, Justice, joined by DOGGETT, GAMMAGE and SPECTOR, Justices, dissenting.

The court concludes that the rule of *Texas Co. v. Davis,* 113 Tex. 321, 254 S.W. 304 (1923), only applies if a lease states an express purpose of production of oil and gas and if there is a clause limiting duration of the lease for as long as oil and gas is produced. In discussing the manner in which oil and gas leases transfer title and abandonment of purpose, *Davis* stated,

> Much the same practical results are obtained whether the mineral estate conveyed is regarded as determinable or is regarded as held on condition subsequent, where there has been a failure of the lessee to perform the obligations, express or implied, which are essential to the accomplishment of the purpose of the grant. Our object is to announce a rule which is truly consonant with the real intent of the contracting parties.
>
> We are convinced: First, that Underwood and his assigns took only a determinable fee . . .; and, second, that abandonment of the purpose for which Underwood and his assigns were invested with their title was necessarily fatal to the maintenance of the suit. . . .

254 S.W. at 309. The court translates the effort to understand the purpose of the lease into a requirement that the lease expressly state the purpose. This is inconsistent with the well-settled principle that a contract shall be construed as a whole and in light of the purposes and objects for which it was made. *E.g., id.,* 254 S.W. at 308 (quoting with approval the "irrefutable logic" of *Parish Fork Oil Co. v. Bridgewater Gas Co.,* 51 W. Va. 583, 42 S.E. 655 (1902) (citing *Ray v. Gas Co.,* 138 Pa. 576, 20 A. 1065 (1891))). The court does not attempt this analysis, relying instead on the proposition that obligations should not be implied into a contract, particularly in opposition to express language in the contract. This argument misses the point; although there is no express language stating what the purpose of the contract is, the contract still has a purpose. If that purpose is the production of oil and gas, then a complete
771 failure to pursue that purpose — "not a *771 partial use, nor a negligent use, nor an imperfect use, but cessation of use," *Waggoner Estate v. Sigler Oil Co.,* 118 Tex. 509, 19 S.W.2d 27, 29 (1929) — is an abandonment of the purpose, which terminates the estate. *Id.* Because I believe that the purpose of this contract was for exploration, development, and production of oil, gas, and minerals, and because the jury determined that the purpose of the assignment was abandoned, I would apply *Davis* to conclude that the assignment automatically terminated. Thus, I would affirm the judgment of the trial court in favor of Ricane.

No. C-9556
Supreme Court of Texas

Texas Ass'n of Business v. Texas Air Control Bd.

852 S.W.2d 440 (Tex. 1993) · 36 Tex. Sup. J. 607 · 1993 Tex. LEXIS 22
Decided May 5, 1993

NO. C-9556

March 3, 1993, Delivered

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441 *441 OPINION

The Texas Association of Business (TAB), on behalf of its members, brought this declaratory judgment action seeking a ruling that statutes empowering two state administrative agencies to levy civil penalties for violations of their regulations conflict with the open courts and jury trial provisions of the Texas Constitution. The administrative agencies denied TAB's claims, and along with two Intervenors, [1] filed counterclaims 442 seeking a declaration *442 that the same statutes and regulations comport with those constitutional provisions.

[1] The League of Women Voters and the Lone Star Chapter of the Sierra Club intervened in the suit and were aligned as defendants with the Texas Air Control Board and the Texas Water Commission. Justice Doggett contends that the standing of the Intervenors should be addressed along with TAB's. We disagree. Standing concerns a party's faculty to invoke the court's subject matter jurisdiction. Once it has been invoked by a plaintiff, a court's subject matter jurisdiction is not affected by the status of defendants or intervenors aligned in interest with defendants.

Following a bench trial, the trial court denied the relief sought by TAB, and as requested by the State and Intervenors, declared that section 4.041 of the Texas Clean Air Act, sections 26.136 and 27.1015 of the Texas Water Code, and section 8b of the Texas Solid Waste Disposal Act, as well as the rules and regulations promulgated under those statutes, are constitutional with regard to the open courts and jury trial provisions. We affirm the trial court's judgment as it relates to TAB's jury trial challenge and reverse its judgment as to TAB's open courts challenge.

An overview of the regulatory scheme enacted by the legislature and these agencies is essential to an understanding of this case. In 1967, the Texas

Legislature enacted the Clean Air Act of Texas. Clean Air Act of Texas, 60th Leg., R.S., ch. 727, 1967 Tex. Gen. Laws 1941. The Clean Air Act was designed to safeguard the state's air resources without compromising the economic development of the state. *Id.* at § 1. The Act created the Texas Air Control Board and granted it the authority to promulgate regulations to accomplish the Act's goals. *Id.* at § 4(A)(2)(a). In the event the Air Control Board determined that a violation of its regulations had occurred, it was authorized to enforce those regulations in district court. Upon a judicial determination that a violation of the Air Control Board's regulations had occurred, two cumulative remedies were available, injunctive relief to prohibit further violations and assessment of a fine ranging from $ 50 to $ 1,000 for each day the violations persisted. *Id.* at § 12(B).

In 1969, the Texas Legislature enacted the Solid Waste Disposal Act. Solid Waste Disposal Act, 61st Leg., R.S., ch. 405, 1969 Tex. Gen. Laws 1320. The express purpose for this legislation was to protect public health and welfare by regulating the "collection, handling, storage, and disposal of solid waste." *Id.* at § 1. The Texas Water Quality Board was designated the primary agency to effectuate the Disposal Act's purpose. *Id.* at § 4(f). Like the Air Control Board, the Water Quality Board was authorized to enforce its rules and regulations in state district court. The Solid Waste Disposal Act provided the same remedies as the Clean Air Act. *See id.* at § 8(c).

In the last of the relevant statutory enactments, in 1969, the Texas Legislature promulgated a revised version of the Water Quality Act. Water Quality Act - Revision, 61st Leg., R.S., ch. 760, 1969 Tex. Gen. Laws 2229. By that Act, the Water Quality Board was given the power to develop a statewide water quality plan, to perform research and investigations, and to adopt rules and issue orders necessary to effectuate the Act's purposes. *Id.* at § 3.01-3.10. The Water Quality Act provided the same remedies as the Solid Waste Management Act and the Clean Air Act. *See id.* at § 4.02.

Originally, neither the Water Quality Board nor the Air Control Board had the power to levy civil penalties directly in the event it determined that its regulations or orders had been violated. Instead, each board was required first to file suit against the violator in district court. Only the district court had the power to assess civil penalties.

The legislature substantially changed this enforcement scheme in 1985. That year the Air Control Board and the Water Commission (formerly the Water Control Board) were granted the power to assess civil penalties directly of up to $ 10,000 per day per violation. [2] Both administrative bodies also retained the option to pursue civil penalties in district court. TEX. 443 HEALTH *443 & SAFETY CODE §§ 361.224, 382.081; TEX. WATER CODE § 26.123. This was the regulatory scheme in effect when the district court rendered judgment in this case. [3]

[2] Act of June 14, 1985, 69th Leg., R.S., ch. 637, § 33, 1985 Tex. Gen. Laws 2350, 2359 (amending Texas Clean Air Act codified at TEX. REV. CIV. STAT. ANN. art. 4.041 (Vernon 1976), currently codified as amended at TEX. HEALTH & SAFETY CODE § 382.088; Act of June 15, 1985, 69th Leg., R.S., ch. 795, § 6.001, 1985 Tex. Gen. Laws 2719, 2813 (amending Solid Waste Disposal Act codified at TEX. REV. CIV. STAT. ANN. art. 4477-7 (Vernon 1976), currently codified as amended at TEX. HEALTH & SAFETY CODE § 361.252; Act of June 15, 1985, 69th Leg., R.S., ch. 795, § 5.007, 1985 Tex. Gen. Laws 2719, 2806 (amending TEX. WATER CODE § 26.136).

[3] Although some amendments have been adopted since, they are not relevant to the issue presented in this case. *See* Diana C. Dutton, *ENVIRONMENTAL*, 45 SW. L.J. 389 (1991)(summarizing statutory developments).

After the Air Control Board or Water Commission assesses a penalty, the offender must either timely pay the penalty or file suit in district court. However, a supersedeas bond or cash deposit paid into an escrow account, in the full amount of the penalty, is a prerequisite to judicial review. TEX. HEALTH & SAFETY CODE §§ 382.089(a),(b), 361.252(k),(l); TEX. WATER CODE § 26.136(j). A party who fails to make a cash deposit or file a bond forfeits all rights to judicial review. TEX. HEALTH & SAFETY CODE §§ 361.252(m), 382.089(c); TEX. WATER CODE § 26.136(k).

TAB alleges that it is a Texas not-for-profit corporation, that its members do business throughout Texas, and that it is authorized to represent its members on any matter that may have an impact on their businesses.

TAB filed this suit under the Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE §§ 37.001-37.011, alleging that some of its members had been subjected to civil penalties assessed by either the Air Control Board or the Water Commission. TAB further alleged that all of its other members that operate their businesses pursuant to the pertinent provisions of the Texas Clean Air Act, the Texas Water Code, or the Texas Solid Waste Disposal Act or any rules or orders issued pursuant to those provisions were put at "substantial risk (if not certainty)" of being assessed civil penalties by the Air Control Board or the Water Commission. Thus this suit does not challenge specific instances of the Air Control Board's or the Water Commission's exercise, or threatened exercise, of the civil penalty power. Instead, TAB's suit is a facial challenge to the constitutionality of this administrative enforcement scheme under the Texas Constitution.

The Defendants and Intervenors counterclaimed seeking a declaratory judgment that the statutes, rules, and regulations challenged by TAB do not, on their face, conflict with the open courts and jury trial provisions of our constitution. The trial court granted the Defendants' and Intervenors' requested declaratory judgment and denied TAB's request for a declaratory judgment. The court also denied TAB's request for injunctive relief.

TAB appealed directly to this court. *See* TEX. GOV'T CODE § 22.001(c); [4] TEX. R. APP. P. 140. In this court, TAB has limited its challenges to claims of unconstitutional denial of a jury trial and violation of our constitution's open courts provision.

[4] "An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state." TEX. GOV'T CODE § 22.001(c).

I. Standing

Before we reach the merits of this case, we first consider the matter of the trial court's jurisdiction, as well as our own; specifically we determine whether TAB has standing to challenge the statutes and regulations in question. Because TAB's standing to bring this action is not readily apparent, and because our jurisdiction as well as that of the trial court depends on this issue, we requested supplemental briefing on standing at the oral argument of this case. In response, the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal. We disagree.

Subject matter jurisdiction is essential to the authority of a court to decide a case. Standing is implicit in the concept of subject matter jurisdiction. The standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision. Subject matter jurisdiction
444 *444 is never presumed and cannot be waived. [5]

[5] Justice Doggett confuses subject matter jurisdiction with personal jurisdiction. Only the latter can be waived when uncontested. *See* TEX. R. CIV. P. 120a.

One limit on courts' jurisdiction under both the state and federal constitutions is the separation of powers doctrine. *See* TEX. CONST. art. II, § 1; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-74, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982); *Warth v. Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1974); *see also*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 18 SUFFOLK U. L. Rev 881, 889 n.69 (1983)(noting that the dicta of *Flast v. Cohen*, 392 U.S. 83, 100, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968), suggesting that standing is unrelated to the separation of powers doctrine has since been disavowed). Under this doctrine, governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution. Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department. [6] *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1969); *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 644 (Tex. 1933). Accordingly, we have interpreted the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE §§ 37.001-.011, to be merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions. *Firemen's Ins. Co.*, 442 S.W.2d at 333; *United Serv. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 863 (Tex. 1965); *California Prods., Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 334 S.W.2d 780 (1960).

6 The analysis is the same under the federal constitution. *See e.g.* Correspondence of the Justices, Letter from Chief Justice John Jay and the Associate Justices to President George Washington, August 8, 1793 in Laurence H. Tribe, *American Constitutional Law* 73 n.3 (2nd ed. 1988).

The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945); *Firemen's Ins. Co.*, 442 S.W.2d at 333; *Puretex Lemon Juice, Inc.*, 160 Tex. at 591, 334 S.W.2d at 783. An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury. *See Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). Texas courts, like federal courts, have no jurisdiction to render such opinions.

The separation of powers doctrine is not the only constitutional basis for standing. Under federal law, standing is also an aspect of the Article III limitation of the judicial power to "cases" and "controversies." *Sierra Club v. Morton*, 405 U.S. 727, 731, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). To comport with Article III, a federal court may hear a case only when the litigant has been threatened with or has sustained an injury. *Valley Forge Christian College*, 454 U.S. at 471. Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury. Specifically, the open courts provision provides:

All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13 (emphasis added). Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.

Under federal law, a lack of standing deprives a court of subject matter jurisdiction because
445 standing is an element of such *445 jurisdiction. *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1061

(5th Cir. 1991); *Simmons v. Interstate Commerce Comm'n*, 900 F.2d 1023, 1026 (7th Cir. 1990); *M.A.I.N. v. Commissioner, Maine Dept. of Human Serv.*, 876 F.2d 1051, 1053 (1st Cir. 1989); *Haase v. Sessions*, 266 U.S. App. D.C. 325, 835 F.2d 902, 908 (D.C. Cir. 1987); *Page v. Schweiker*, 786 F.2d 150, 153 (3d Cir. 1986); *see also Lujan v. Defenders of Wildlife*, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); *Heckler v. Mathews*, 465 U.S. 728, 737, 79 L. Ed. 2d, 104 S. Ct. 1387 (1984); *Warth*, 422 U.S. at 511. Other states have followed this analysis in construing their own constitutions. [7] *See e.g., Prudential-Bache Sec., Inc. v. Commissioner of Revenue*, 588 N.E.2d 639, 642 (Mass. 1992); *Bennett v. Board of Trustees for Univ. of N. Colorado*, 782 P.2d 1214, 1216 (Colo. App.), *cert. denied*, 797 P.2d 748 (Colo. 1989); *Pace Constr. Co. v. Missouri Highway and Transp. Comm'n*, 759 S.W.2d 272, 274 (Mo. App. 1988); *Terracor v. Utah Bd. of State Lands Forestry*, 716 P.2d 796, 798-99 (Utah 1986); *State by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985), *appeal dism'd*, 478 U.S. 1015 (1986); *Smith v. Allstate Ins. Co.*, 483 A.2d 344, 346 (Me. 1984); *Ardmare Constr. Co. v. Freedman*, 191 Conn. 497, 467 A.2d 674, 675 n.4, 676-77 (Conn. 1983); *Horn v. County of Ventura*, 24 Cal. 3d 605, 596 P.2d 1134, 1142 (Cal. 1979); *Stewart v. Board of County Comm'rs of Big Horn County*, 175 Mont. 197, 573 P.2d 184, 186, 188 (Mont. 1977); *Albritton v. Moore*, 238 La. 728, 116 So.2d 502, 504 (La. 1959).

[7] Of the states listed by Justice Doggett, only Illinois, Iowa, Kentucky, New York, South Dakota, and perhaps Ohio, Pennsylvania and Washington actually treat jurisdictional standing as waivable. *See* ___ S.W.2d at ___. The other state cases cited deal with the waiver of objections to join a real party in interest or to a party's capacity to sue rather than to jurisdictional standing. *See International Depository, Inc. v. State*, 603 A.2d 1119, 1122 (R.I. 1992)(addressing real party in interest objection); *Princess Anne Hills Civ. League, Inc. v. Susan Constant Real Estate Trust*, 413 S.W.2d 599, 603 n.1 (Va. 1992)(addressing real party in interest objection); *Sanford v. Jackson Mall Shopping Ctr. Co.*, 516 So.2d 227, 230 (Miss. 1987)(addressing real party in interest objection); *Jackson v. Nangle*, 677 P.2d 242, 250 n.10 (Alaska 1984)(addressing real party in interest objection); *Poling v. Wisconsin Physicians Serv.*, 120 Wis. 2d 603, 357 N.W.2d 293, 297-98 (Wisc. App. 1984)(addressing real party in interest objection); *Torrez v. State Farm Mut. Auto Ins. Co.*, 130 Ariz. 223, 635 P.2d 511, 513 n.2 (Ariz. App. 1981) (addressing real party in interest objection); *Brown v. Robinson*, 354 So.2d 272, 273 (Ala. 1977); *Cowart v. City of West Palm Beach*, 255 So.2d 673, 675 (Fla. 1971) (addressing capacity objection).

Subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties. *Texas Employment Comm'n v. International Union of Elec., Radio and Mach. Workers, Local Union No. 782*, 163 Tex. 135, 352 S.W.2d 252, 253 (Tex. 1961); RESTATEMENT (SECOND) OF JUDGMENTS § 11, comment c (1982). This court recently reiterated that axiom in *Gorman v. Life Insurance Co.*, 811 S.W.2d 542, 547 (Tex.), *cert. denied*, 116 L. Ed. 2d 60, 112 S. Ct. 88 (1991). Because we conclude that standing is a component of subject matter jurisdiction, it cannot be waived and may be raised for the first time on appeal. [8]

[8] Justice Doggett disagrees that standing is a component of subject matter jurisdiction, yet he declines to explain what role standing plays in our jurisprudence. From his harsh critique of the doctrine, it seems that he not only objects to the conclusion that standing cannot be waived but also to the conclusion that standing is a requirement to initiate a lawsuit.

If we were to conclude that standing is unreviewable on appeal at least three undesirable consequences could result. First and foremost,

appellate courts would be impotent to prevent lower courts from exceeding their constitutional and statutory limits of authority. Second, appellate courts could not arrest collusive suits. Third, by operation of the doctrines of res judicata and collateral estoppel, judgments rendered in suits addressing only hypothetical injuries could bar relitigation of issues by a litigant who eventually suffers an actual injury. We therefore hold that
446 standing, as a component of subject matter *446 jurisdiction, cannot be waived in this or any other case and may be raised for the first time on appeal by the parties or by the court.

We are aware that this holding conflicts with *Texas Industrial Traffic League v. Railroad Commission*, 633 S.W.2d 821, 823 (Tex. 1982) (per curiam). [9] The analysis that leads us to the conclusion we reach here, however, compels us to overrule *Texas Industrial Traffic League* and disapprove of all cases relying on it to the extent that they conflict with this opinion. [10] Although our concern for the rule of stare decisis makes us hesitant to overrule any case, when constitutional principles are at issue this court as a practical matter is the only government institution with the power and duty to correct such errors. *See Payne v. Tennessee*, 115 L. Ed. 2d 720, 111 S.Ct. 2597, 2609-11 (1991) (observing that reexamination of constitutional decisions is appropriate when "correction through legislative action is practically impossible").

[9] *Texas Industrial Traffic League* relied on two cases to support its holding that standing cannot be raised for the first time on appeal: *Coffee v. Rice University*, 403 S.W.2d 340, 341 (Tex. 1966), and *Sabine River Authority v. Willis*, 369 S.W.2d 348, 350 (Tex. 1963). We need not overrule these two cases, however, because unlike *Texas Industrial Traffic League*, we believe that standing was present in the trial court in these cases. Our concern is with a party's right to initiate a lawsuit and the trial court's corresponding power to hear the case *ab initio*. Standing is determined at the time suit is filed in the trial court, and subsequent events do not deprive the court of subject matter jurisdiction. *Carr*, 931 F.2d at 1061.

[10] Justice Doggett claims that we overrule three additional decisions of this court. *See Central Educ. Agency v. Burke*, 711 S.W.2d 7 (Tex. 1986)(per curiam); *American Gen. Fire & Casualty Co. v. Weinberg*, 639 S.W.2d 688 (Tex. 1982); *Cox v. Johnson*, 638 S.W.2d 867 (Tex. 1982)(per curiam). We disagree. These cases hold that matters not raised in the trial court are waived. One exception noted by these decisions, however, is a lack of jurisdiction which may be raised by a party, or the court, for the first time on appeal. Justice Doggett does not believe that standing falls within that exception because he contends that standing is not jurisdictional.

Consequently, we proceed to determine here, on our own motion, whether TAB has standing to bring this suit.

Because standing is a component of subject matter jurisdiction, we consider TAB's standing under the same standard by which we review subject matter jurisdiction generally. That standard requires the pleader to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836, 839 (Tex. 1967). When reviewing a trial court order dismissing a cause for want of jurisdiction, Texas appellate courts "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *Huston v. Federal Deposit Ins. Corp.*, 663 S.W.2d 126, 129 (Tex. App.--Eastland 1983, writ ref'd n.r.e. 1984); *see also* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 870 (1990).

Here, however, we are not reviewing a trial court order of dismissal for want of jurisdiction, we are considering standing for the first time on appeal. A review of only the pleadings to determine subject matter jurisdiction is sufficient in the trial court because a litigant has a right to amend to

attempt to cure pleading defects if jurisdictional facts are not alleged. *See* TEX. R. CIV. P. 80. Failing that, the suit is dismissed. When an appellate court questions jurisdiction on appeal for the first time, however, there is no opportunity to cure the defect. Therefore, when a Texas appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing.

TAB asserts standing on behalf of its members. The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Board of Water Engineers v. City of San Antonio*, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955). Texas, however, has no particular test for determining the standing of an organization, such as TAB. *See e.g.*, *Touchy* 447 *v.* *447 *Houston Legal Found.*, 432 S.W.2d 690, 694 (Tex. 1968); *Texas Highway Comm'n v. Texas Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525, 530-31 (Tex. 1963). While we agree with the statement of the general test for standing set out in *Board of Water Engineers*, we foresee difficulties in relying on it alone to determine the standing of an organization like TAB. For instance, when members of an organization have individual standing, but the organization was not established for the purpose of protecting the particular interest at issue, it is not necessarily in the members' best interest to allow such a disinterested organization to sue on their behalf. Furthermore, an organization should not be allowed to sue on behalf of its members when the claim asserted requires the participation of the members individually rather than as an association, such as when the members seek to recover money damages and the amount of damages varies with each member.

The United States Supreme Court has articulated a standard for associational standing that lends itself to our use. We adopt that test today. In *Hunt v. Washington State Apple Advertising Commission*, the Court held that an association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. 333, 343 (1977); *see also New York State Club Ass'n. v. City of New York*, 487 U.S. 1, 9, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988); *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282, 91 L. Ed. 2d 228, 106 S. Ct. 2523 (1986). This standard incorporates the standing analysis we adopted in *Board of Water Engineers*, yet addresses the additional concerns we have noted.

We now apply the *Hunt* standard to the case before us. Reviewing the record in its entirety for evidence supporting subject matter jurisdiction, and resolving any doubt in TAB's favor, we conclude that TAB has standing to pursue the relief it seeks in this case.

The first prong of the *Hunt* test requires that TAB's pleadings and the rest of the record demonstrate that TAB's members have standing to sue in their own behalf. This requirement should not be interpreted to impose unreasonable obstacles to associational representation. In this regard the United States Supreme Court stated that " the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n*, 487 U.S. at 9. We are satisfied that TAB has not manufactured this lawsuit. A comparison of the association's membership roster with the list of businesses subjected to state penalties indicates individual TAB members have been assessed administrative penalties pursuant to the challenged enactments. Additionally, TAB has alleged that other of its members remain at substantial risk of penalty. A substantial risk of injury is sufficient

under *Hunt*. *See e.g., Pennell v. City of San Jose*, 485 U.S. 1, 7, 99 L. Ed. 2d 1, 108 S. Ct. 849 n.3 (1988)(concluding that association of landlords had standing based on pleadings that individual members would likely be harmed by rent ordinance). Thus TAB satisfies the first prong of the *Hunt* test.

The second prong of *Hunt* requires that TAB's pleadings and the rest of the record demonstrate that the interests TAB seeks to protect are germane to the organization's purpose. TAB was chartered to "represent the interests of its members on issues which may impact upon its members' businesses." Considering a very similar question in *New York State Club Association*, the United States Supreme Court held that: "The associational interests that the consortium seeks to protect are germane to its purpose: appellant's certificate of incorporation states that its purpose is 'to promote the common
448 business interests of its *448 [member clubs].'" 487 U.S. at 10 n.4. (bracketed language in original). Likewise, the interests TAB desires to protect are germane to the organization's purpose, and thus the second prong is met.

Under the third and final prong of the *Hunt* test, TAB's pleadings and the record must demonstrate that neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. The Supreme Court has interpreted this prong as follows:

> Whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Hunt, 432 U.S. at 343, (quoting *Warth*, 422 U.S. at 515).

By seeking damages on behalf of its members, necessitating that each individual prove lost profits particular to its operations, the organization in *Warth* lacked standing to sue; rather, each individual member had to be a party to the suit. These facts are distinguishable from *Brock*, in which the union challenged an administrative interpretation of statutory provisions relating to unemployment compensation. 477 U.S. 274. Recognizing that the suit raised "a pure question of law," and that "the individual circumstances" of any aggrieved member were not in issue, the Court held that the UAW had standing to challenge the government's actions. *Id.* at 287-88, 290; *see also Pennell*, 485 U.S. at 7 n.3 (facial challenge to rent ordinance does not require participation of individual landlords). Here, TAB seeks only prospective relief, raises only issues of law, and need not prove the individual circumstances of its members to obtain that relief, thus meeting the third prong of *Hunt*.

Having found that TAB meets all three prongs of the *Hunt* test, we conclude that TAB has standing to pursue the relief it seeks in this case.

II. Open Courts

TAB contends that the prepayment requirements of the statutes and regulations in question violate the open courts provision of the Texas Constitution by unreasonably restricting access to the courts. After the agency has found a party to be in violation of any of these statutes and regulations, the offender must either tender a cash deposit or post a supersedeas bond in the full amount of the penalties assessed, or forfeit the right to judicial review. [11]

[11] In most other jurisdictions, such prepayment provisions are required only to stay execution of judgments and are not prerequisites to the right to appeal itself. *See* Gary Stein, *Expanding the Due Process Rights of Indigent Litigants: Will Texaco Trickle Down?*, 61 N.Y.U. L. REV. 463, 469 (1986).

Historically, we have recognized at least three separate constitutional guarantees emanating from our open courts provision. First, courts must actually be open and operating, so that, for example, the legislature must place every county within a judicial district. *Runge & Co. v. Wyatt*, 25 Tex. Supp. 294 (1860). Second, citizens must have access to those courts unimpeded by unreasonable financial barriers, so that the legislature cannot impose a litigation tax in the form of increased filing fees to enhance the state's general revenue, *LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex. 1986). Finally, meaningful legal remedies must be afforded to our citizens, so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress. *Sax v. Votteler*, 648 S.W.2d 661, 665-66 (Tex. 1983).

Here the second guarantee is applicable. This is not a question of the abrogation of any well-
449 established common law cause *449 of action, [12] just as it is not a question of the physical absence of a court to which a complaint may be brought. The issue before us is access to the courts. In previous cases involving this issue, we did not predicate our decision on whether the party whose access had been restricted was attempting to assert a common law cause of action. In *LeCroy*, for example, the court did not permit increased filing fees for statutory causes of action while denying them for common law claims. 713 S.W.2d 335. Likewise in *Dillingham v. Putnam*, when the court struck down a statute requiring a supersedeas bond as a condition of appeal, the court did not concern itself with whether the particular appeal being restricted involved a common law or statutory claim. 14 S.W. 303 (Tex. 1890). Similarly, in the present case, the issue is simply whether the prepayment requirement is an unreasonable financial barrier to access to the courts in light of the state interest involved.

12 Thus, contrary to Justice Doggett's reading of our opinion, the *Sax* test is inapplicable.

The stated purpose of the regulatory statutes at issue here is to protect our state's natural resources. [13] There is no question that this is an important state interest. [14] The state argues that the prepayment provisions further this interest by increasing the deterrent effect of the penalties and by aiding in their collection. The state maintains that a violator will be less deterred by an administrative penalty if it can delay payment without bond while appealing the case in the courts. The state also argues that delay may render the penalty uncollectible, as the violator may become insolvent.

13 The Clean Air Act was implemented to "safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants . . . ." TEX. HEALTH & SAFETY CODE § 382.002(a). The Texas Water Code was implemented to "maintain the quality of water in the state consistent with the public health and enjoyment . . ." TEX. WATER CODE § 26.003.

14 The importance is evidenced by article XVI, section 59(a) of our constitution, which provides in relevant part that: "The conservation and development of all the natural resources of this State . . . and the preservation and conservation of all such natural resources . . . are each and all . . . public rights and duties." TEX. CONST. art. XVI, § 59(a).

In considering these rationales, we note that the prepayment provisions actually consist of two elements. First, the assessed penalty must be paid, or financial security provided, within thirty days; enforcement is not stayed pending any period of judicial review. [15] Second, if payment is not made or financial security provided within the thirty-day period, the right to judicial review is forfeited. We agree that the rationales advanced by the state justify the first of these elements. Requiring expeditious payment of the administrative penalties increases their effectiveness. The

legislature, however, could have imposed the first element without the second. It could have provided the agency with the right to collection of assessed penalties unless a supersedeas bond is posted, yet provided for judicial review. The requirement of immediate payment, without the corresponding forfeiture provision, would not have implicated the open courts provision, as the charged party could have obtained judicial review regardless of payment. This approach would have been in accordance with the usual procedure governing appeals of trial court judgments. *See* TEX. R. APP. P. 40. Any litigant may appeal without superseding the trial court's judgment, but the mere pendency of an appeal does not stay
450 enforcement of the judgment. [16] *450 Our specific focus for purposes of our open courts analysis, therefore, is not whether the requirement of immediate payment is reasonable, but whether the forfeiture of the right of judicial review, if the penalties are not superseded, is reasonable.

15 If the person charged does not make payment or post bond within thirty days, the agency may forward the matter to the attorney general for enforcement. TEX. HEALTH & SAFETY CODE § 382.089(c), § 361.252(m); TEX. WATER CODE § 26.136(k).

16 It has been argued that our procedure of allowing immediate enforcement of trial court judgments violates federal due process when the judgment debtor is financially unable to post a supersedeas bond and immediate enforcement will cause irreparable injury. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987). A similar argument could be fashioned under the Texas open courts provision, but TAB does not assert that argument here. TAB's open courts challenge centers not on the requirement of immediate payment, but on the forfeiture of judicial review if payment is not made.

We conclude that the forfeiture provision is an unreasonable restriction on access to the courts. While the requirement of prepayment or the posting of a bond to stay enforcement furthers the state's important environmental interests by creating a strong incentive for timely payment of the assessed penalties, the forfeiture provision serves no additional interest. [17] The state may accomplish its goals by enforcing the prepayment requirements without infringing on a party's right to its day in court. Accordingly, we hold that the statutes and regulations at issue facially violate our open courts provision. [18]

17 Thus, contrary to Justice Doggett's assertion, we do not strike down the penalties themselves. Nothing in this opinion prohibits the state's collection of assessed penalties. We hold as violative of our open courts provision only the requirement that the penalties be paid as a condition to judicial review. Furthermore, nothing in our opinion requires that penalties already paid be refunded.

18 That the affected parties may be able to afford prepayment is irrelevant. The guarantee of constitutional rights should not depend on the balance in one's bank account.

III. Jury Trial

TAB also claims that the statutes empowering these agencies to assess civil penalties violate the right to a jury trial guaranteed by the Texas Constitution. [19] We disagree.

19 TAB claims that the lack of a jury trial before the agency as well as the lack of a trial de novo violate article I, section 15. We limit our inquiry to the absence of a trial de novo because, as this court has said: "Trial by jury cannot be claimed in an inquiry that is non-judicial in its character, or with respect to proceedings before an administrative board." *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556, 561-62 (Tex. 1916). Even if the right

> to a jury is denied before an administrative agency, the dispositive question is whether a trial de novo and the corresponding right to a jury trial is constitutionally required upon judicial review of the agency's decision. *See Cockrill v. Cox*, 65 Tex. 669, 674 (1886)("The right of jury trial remains inviolate, though denied in the court of first instance [in civil cases], if the right to appeal and the jury trial on appeal are secured.")(bracketed language in original).

Article I, section 15 of our constitution [20] preserves a right to trial by jury for those actions, or analogous actions, tried to a jury at the time the constitution of 1876 was adopted. *E.g.*, *State v. Credit Bureau of Laredo*, 530 S.W.2d 288, 291 (Tex. 1975); *White v. White*, 108 Tex. 570, 196 S.W. 508 (1917); *Hatten v. City of Houston*, 373 S.W.2d 525 (Tex. Civ. App.--Houston 1963, writ ref'd n.r.e.); *Hickman v. Smith*, 238 S.W.2d 838 (Tex. Civ. App.--Austin 1951, writ ref'd). A jury trial is not mandated by this provision for any other judicial proceeding. *Id.*

> 20 Article I, section 15, provides, in pertinent part:
>
> The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. * * * .
>
> TAB has not presented in this court, as it did below, its complaint that the statutes and regulations also violate of the right to jury trial under article V, section 10 of the Texas Constitution.

In *Credit Bureau*, we concluded that a suit for civil penalties for violation of an injunction issued pursuant to the Texas Deceptive Trade Practices Act was analogous to the common law action for debt, tried to a jury at the time our constitution was adopted. 530 S.W.2d at 293. Thus, we held that the right to a jury trial for that action remained inviolate. *Id.* We observed in *Credit Bureau*, however, that in certain types of adversary proceedings the constitutional right to a jury trial does not attach. Among the proceedings we referred to are appeals from administrative decisions. [21] *Id.* (citing *State v. De Silva*, 105 Tex. 451 95, 145 S.W. 330 (1912), and *Texas* *451 *Liquor Control Bd. v. Jones*, 112 S.W.2d 227 (Tex. Civ. App.--Houston 1963, writ ref'd n.r.e.)). Consistent with this noted exception in *Credit Bureau*, we conclude that these agencies' assessments of environmental penalties are not actions, or analogous actions, to those tried to a jury at the time the constitution of 1876 was adopted. To hold that these environmental statutes and regulations promulgated in the late 1960s merely parrot common law and statutory rights triable to a jury in 1876 would turn a blind eye to the emergence of the modern administrative state and its profound impact on our legal and social order. In the late 19th century, ours was primarily a sparsely-populated agrarian society. *See generally*, T.R. Fehrenbach, *Lone Star: A History of Texas and the Texans*, 279-324 (1983). By contrast, concentrated industrial activity and its by-products, including the wide-spread emission of pollutants, with their resulting potential for significant damage to our natural resources are phenomena of relatively recent origin. In response to such phenomena, regulatory schemes, such as those challenged here, were designed to balance mounting environmental concerns with our state's economic vitality. In 1876 no governmental schemes akin to these existed. [22] Thus, we conclude that the contested proceedings are not analogous to any action tried to a jury in 1876. Accordingly, we hold that no right to a jury trial attaches to appeals from administrative adjudications under the environmental statutes and regulations at issue here. [23]

> 21 While the *Credit Bureau* court specifically referred to the broader jury trial provision in article V, section 10 when it discussed the administrative proceeding exception, that exception necessarily also applies to the narrower provision found in article I, section 15.

We do not consider nineteenth century criminal nuisance laws comparable to modern environmental regulations. *See* ___ S.W.2d ___.

23 Despite Justice Doggett's trumpeting of our constitution's guarantee of trial by jury, he agrees that the right does not attach under the circumstances of this case.

We should not be misunderstood to say that the legislature may abrogate the right to trial by jury in any case by delegating duties to an administrative agency. Here, we simply reaffirm what this court held almost a half century ago, in *Corzelius v. Harrell* 143 Tex. 509, 186 S.W.2d 961 (1945). In *Corzelius*, we concluded that certain judicial functions, including fact finding, may be delegated constitutionally by the legislature to administrative agencies in furtherance of the preservation and conservation of the state's natural resources. The decision in *Corzelius* was based on article XVI, section 59(a) of our constitution, which provides in relevant part: "The conservation and development of all the natural resources of this State . . . and the preservation and conservation of all such natural resources . . . are each and all . . . public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." TEX. CONST. art. XVI, § 59(a). "By the use of the broad language used in Article XVI, Section 59(a)," the court stated, "the Legislature is authorized to enact such laws as are necessary to carry out the purposes for which such constitutional amendment was adopted." *Corzelius*, 186 S.W.2d at 964. [24]

24 Justice Doggett contends that the basis for our jury trial holding is overbroad. Instead, he would have us adopt the "imperfectly employed" federal test first enunciated in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). *infra*, ___ S.W.2d at ____. The basis for our decision is more limited, arising as it does out of TEX. CONST. article XVI, section 59(a) and our decision in *Corzelius*.

There is no doubt that the legislature delegated the power to assess these civil penalties to the Air Control Board and the Water Commission as a manifestation of the public's interest in preserving and conserving the state's air and water resources. That intent is apparent from the policy statements of the relevant statutes. [25] *452 We conclude, therefore, that the delegation of the fact-finding function by the legislature to the Air Control Board and the Water Commission under this statutory scheme was within the legislature's constitutional authority.

25 The Clean Air Act proclaims:

> The policy of this state and the purpose of this chapter to safeguard the air resources of the state from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property of the people, including the aesthetic enjoyment of air resources by the public and the maintenance of adequate visibility.

TEX. HEALTH & SAFETY CODE § 382.002.

The Texas Water Code proclaims in relevant part:

> It is the policy of this state and the purpose of the subchapter to maintain the quality of water in the state consistent with the public health and enjoyment
>
> . . .

TEX. WATER CODE § 26.003.

Of course, the fact that no jury trial is provided by the legislature to an alleged violator of these environmental protection laws does not mean that the agencies' power to assess

penalties is unbridled. [26] The Air Control Board and the Water Commission may act only within constitutional and statutory parameters.

26

The actions of the agencies involved in this proceeding are subject to the Administrative Procedure and Texas Register Act (APTRA), which specifically affords a "full panoply of procedural safeguards" to a party to contested case before those agencies. *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex.*, 571 S.W.2d 503, 507 (Tex. 1978). These procedural safeguards include the right to notice, the making of a full record of the proceeding before the agency, the taking of depositions, the right to subpoena witnesses, the application of the rules of evidence, the preparation of proposal for decision and the filing of exceptions and briefs, as well as separately stated findings of fact and conclusions of law. TEX. CIV. STAT. ANN. art. 6252-13a § 19 (Vernon Supp. 1993). Judicial review is provided by section 19(e) under the substantial evidence rule, which directs a reviewing court to reverse and remand the agency adjudication if the agency decision is:

1) in violation of constitutional or statutory provisions;

2) in excess of the statutory authority of the agency;

3) made upon unlawful procedure;

4) affected by other error of law;

5) not reasonably supported by substantial evidence in view of the reliable and probative evidence in the record as a whole; or

6) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

We have held that judicial review under APTRA based on the record developed before the agency "furnishes more assurance of due process and a surer means of determining whether an agency acted arbitrarily, capriciously and without due regard for the evidence." Imperial Am. Resources Fund, Inc. v. Railroad Comm'n of Tex., 557 S.W.2d 280, 285 (Tex. 1977); *see also*, *Southwestern Bell Tel. Co.*, 571 S.W.2d at 509.

For the reasons set out above, we reverse that portion of the trial court's judgment declaring that section 4.041 of the Texas Clean Air Act, sections 26.136 and 27.1015 of the Texas Water Code, and section 8b of the Texas Solid Waste Disposal Act and the rules and regulations promulgated under those statutes comport with the open courts provision of our constitution, article I, section 13. We declare that the requirement of a supersedeas bond or cash deposit paid into an escrow account as a prerequisite to judicial review under TEX. HEALTH & SAFETY CODE §§ 382.089(a),(b), 361.252(k),(l), and TEX. WATER CODE § 26.136(j) is unconstitutional. We affirm that portion of the trial court's judgment declaring that the listed statutes, rules, and regulations do not violate the jury trial provision of our constitution, article I, section 15.

John Cornyn

Justice

Concurring and Dissenting Opinion by Justice Doggett.

Concurring and Dissenting Opinion by Justice Gammage.

Concurring and Dissenting Opinion by Justice Spector.

Justice Hightower not sitting.

OPINION DELIVERED: March 3, 1993

Concur by:BOB GAMMAGE (In Part); LLOYD DOGGETT (In Part); ROSE SPECTOR (In Part)

Dissent by:BOB GAMMAGE (In Part); LLOYD DOGGETT (In Part); ROSE SPECTOR (In Part)

Dissent

CONCURRING AND DISSENTING OPINION

BOB GAMMAGE

Though I would prefer not to write separately, I find I am unable to agree entirely with any single opinion of the court's other members. I must write this concurring and dissenting opinion because, while I agree with the disposition of this cause, I disagree with substantial portions of the reasoning and language in the majority's opinion and I agree with part of Justice Doggett's concurring and dissenting opinion.

I agree with the preliminary portion of Justice Cornyn's majority opinion, which correctly sets forth the regulatory scheme and basic dispute.

I agree *substantially* with Part II of Justice Doggett's opinion and his jury trial discussion. In my view, whether or not a suit is a "cause" for purposes of the right to a jury trial is not controlled by whether it was first determined by an administrative agency. I also agree with Part III of Justice Doggett's opinion relating to standing, which I will further address below. I agree with Part II of Justice Cornyn's majority opinion. The statutes may not condition access to the courts on prepayment of a *penalty*. The principle here is the same as for a supersedeas bond. The statute may condition the right to restrain the prevailing party (the State) from executing (enforcing) its judgment (administrative order) on the posting of a bond for the full amount. It may not, however, condition the *right to appeal* the judgment on posting of the full *penalty* imposed. *Dillingham v. Putnam*, 109 Tex. 1, 5-6, 14 S.W. 303, 304 (1890). This is true even if that "judgment" takes the form of an administrative agency decision. Administrative agency decisions, for the most part, entitle an appellant to only "substantial evidence" as opposed to *de novo* review. To further burden those regulated with prepayment of the "judgment" as the only alternative to total loss of even substantial evidence review violates the basic concept of our constitutional open courts in Texas.

As to the issue (or non-issue) of standing, the majority in effect adopts the position of federal courts that standing is a *jurisdictional* question. Otherwise it cannot be fundamental error to be addressed when no party raises it. Standing was not raised and should not be addressed in this cause.

Even assuming standing is an element of subject matter jurisdiction, the court should not write on the issue in this case. Even though a judgment is void and subject to collateral attack at any point if there is an absence of subject matter jurisdiction,
477 *see Mercer v. Phillips Natural Gas Co.*, *477 746 S.W.2d 933, 936 (Tex. App. -- Austin 1988, writ denied), unassigned error of lack of jurisdiction should be addressed only if jurisdiction is in fact lacking. Since the majority concludes there was standing in this case, and since no party raised its existence as an issue, there is no reason to address it at all, even if it would be *fundamental error* if *lacking*.

The basis for the majority's discussion is its sudden revelation that "standing is implicit in the concept of subject matter jurisdiction." __ S.W.2d at __. Their opinion then claims this implication comes from the separation of powers doctrine and the open courts provision of the Texas Constitution. It is a curiosity of legal scholarship, however, that in the 156 prior years of its existence, this court never before found standing "implicit" in those constitutional provisions, but in fact wrote that standing could be waived and hence was not fundamental error. *Texas Indus. Traffic League v. Railroad Comm'n*, 633 S.W.2d 821, 823 (Tex.1982). Justice Doggett's opinion adequately addresses why there is no implication from those provisions that standing is jurisdictional.

The majority's struggle to put standing in issue when it is not prompts me to address two statements in its opinion which strike me as either misleading or just plain wrong. The majority asserts, without citation to authority, that "subject matter jurisdiction is never presumed," __ S.W.2d at __, and in a footnote repeats that assertion in urging that "Justice Doggett confuses subject matter jurisdiction with personal jurisdiction. Only the latter can be waived when uncontested. *See* TEX. R. CIV. P. 120a." __ S.W.2d at __n.5. The majority's claim that subject matter jurisdiction is never presumed is at its very best misleading.

Connected with this discussion is the implicit assertion in another footnote that there is a "jurisdictional standing" that is different from "objections to join a real party in interest or to a party's capacity to sue rather than jurisdictional standing." __ S.W.2d at __n.7. These remarks are made in an attempt to distinguish the cases cited by Justice Doggett from those of other states holding that standing is not jurisdictional. I suppose we should be encouraged to find out that there are some types of "standing" that will not be jurisdictional, but it occurs to me that by using the term "jurisdictional standing" the court is begging the question -- if it is jurisdictional, then it must be fundamental. The problem is that the Texas cases, at least as I read them, define "standing" in terms of "the party's capacity to sue," [27] which is one example we are given of non-jurisdictional standing. The majority opinion is calculated -- no, guaranteed -- to cause confusion because apparently this court will henceforth tell litigants on a case-by-case basis whether the standing problems in their cases are "jurisdictional" or merely formal.

[27] Before it adopts a federal test and federal gloss, the majority asserts the "general test for standing in Texas" is what it quotes from *Board of Water Engineers v. City of San Antonio*, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955). The majority overrules the *Texas Industrial Traffic League* case, which addressed standing in the context of "justiciable interest" discussed in the more recent cases of *Coffee v. Rice University*, 403 S.W.2d 340 (Tex. 1966), and *Sabine River Authority v. Willis*, 369 S.W.2d 348 (Tex. 1963). The context of the cases differed from *Board of Water Engineers*, of course. The precise meaning of "standing" in fact depends on the context. The majority adopts a federal gloss, and the federal courts have stated, "Generalizations about standing to sue are largely worthless as such." *Association of Data Proc. Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970). Using "standing" to mean a party's legal capacity to sue is my best description of the labyrinth of different cases the majority uses interchangeably.

There is no need to create this confusion. The majority's fomenting it, however, requires that I address it to some extent. I will discuss the "subject matter never presumed" proposition first, then weave into the "jurisdictional standing" language.

I agree that subject matter jurisdiction is never presumed in one respect. Subject matter jurisdiction exists when the nature of the case falls within a general category of cases the court is empowered to adjudicate under the applicable constitutional and statutory provisions. *See Pope v.*
478 *Ferguson*, *478 445 S.W.2d 950, 952 (Tex. 1969), *cert. denied*, 397 U.S. 997, 25 L. Ed. 2d 405, 90 S. Ct. 1138 (1970); *Bullock v. Briggs*, 623 S.W.2d 508, 511 (Tex. App. -- Austin 1981, writ ref'd n.r.e.), *cert. denied*, 452 U.S. 1135 (1982). In this sense, there is no presumption because if the case is not one over which the court had constitutional and statutory authority to act one does not "presume" subject matter jurisdiction to make it valid. If a justice of the peace grants a divorce, the judgment is void because that is not the type of case the constitution and legislature entrusts to that court, and appellate courts will not "presume" the justice court had jurisdiction in order to make the judgment valid.

But what the majority addresses here under the rubric of "standing" is not a court assuming jurisdiction over a type of dispute for which the statutes do not grant it power. The district court undoubtedly had jurisdiction over the declaratory judgment and injunction action brought there, since district courts may entertain declaratory judgment and injunction actions. The question of standing the majority gratuitously addresses here is related to an incidental *party* issue.

This court has expressly held that some facts or similar matters relating to party issues *are presumed*. For example, for many years the subject matter jurisdiction for certain trial courts as set by the statutes has included a jurisdictional amount, sometimes as a minimum amount in controversy and sometimes as both a maximum and minimum. *Womble v. Atkins*, 160 Tex. 363, 370, 331 S.W.2d 294, 299 (1960). This court has held that jurisdiction, so far as the amount in controversy is concerned, is determined by the pleadings unless facts disclose that a party fraudulently or in bad faith pleaded claims to make it disclose there was jurisdiction over the case where there was not. *Brown v. Peters*, 127 Tex. 300, 94 S.W.2d 129, 130 (Tex. Comm'n App. B 1936). Despite the supposed requirement that the pleadings demonstrate jurisdiction, we have also held that unless the pleadings affirmatively show there is *no* jurisdiction, the court will *presume* the existence of jurisdiction in the trial court. *Peek v. Equipment Serv. Co.*, 779 S.W.2d 802, 804 (Tex. 1989). [28] This is not the only sense in which subject matter jurisdiction is "presumed" as to collateral matters. If a defendant contests jurisdiction and alleges in a verified pleading that plaintiff's fraudulent pleading amount was for the purpose of conferring jurisdiction on the trial court, but the trial judge still renders judgment in the case, on appeal the fact issue of jurisdiction is *presumed* decided against the defendant. *Ellis v. Heidrick*, 154 S.W.2d 293, 294 (Tex. Civ. App. -- San Antonio 1941, writ ref'd); *see also Maddux v. Booth*, 108 S.W.2d 329, 331 (Tex. Civ. App. -- Amarillo 1937, no writ)(appeal bond from county court to district court did not show filemark making the appeal timely, held "the absence of such a question being made in the trial court the presumption is that the court had jurisdiction"). Further, if the very power of the judge who sits is in question, that authority too may be presumed. It is presumed that the assignment of a retired judge was properly made pursuant to all statutory requirements absent an express showing to the contrary in the record. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 855 (Tex. App. -- Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[28] *Richardson v. First Nat'l Life Ins. Co.*, 419 S.W.2d 836 (Tex. 1967), relied upon by the majority for the proposition that pleadings must "affirmatively show that the court has jurisdiction to hear the cause," ___ S.W.2d at ___, was expressly distinguished in *Peek*. This unanimous opinion written for the Court by Chief Justice Phillips explained that *Richardson* really meant that if the pleadings affirmatively showed there was *no* jurisdiction, then the case should be dismissed, but otherwise there was a presumption that the amount omitted from the pleading would support jurisdiction. *Peek*, 779 S.W.2d at 804.

There is a type of lack of standing that this court formerly held to be fundamental error. When there was a joint interest in property involved in the litigation, and the joint owner was not joined as a party, this court earlier held that the party defect was jurisdictional fundamental error that could be raised for the first time on appeal. The injustice
479 which that rule caused prompted *479 this court to reduce those " *indispensable*" necessary parties to near nonexistence. *Petroleum Anchor Equip., Inc. v. Tyra*, 406 S.W.2d 891, 893-94 (Tex. 1966); *see also Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 203 (Tex. 1974). It was no accident that this court listed the case which the majority today overrules, *Texas Indus. Traffic League v. Railroad Comm'n*, 633 S.W.2d 821 (Tex. 1982), as one of the cases showing that "fundamental or

unassigned error is a discredited doctrine" as applied to these collateral defect-in-party type claims. *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982). After more than a hundred years of trying to narrow fundamental error exceptions, the majority today takes a quantum leap *backward*.

In an appeal of or other *direct attack* on a trial court default judgment, it is service on the defendant and related due process requirements which must affirmatively appear on the record. In such cases *personal* jurisdiction cannot be presumed. *Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399, 401 (Tex. 1986); *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985); *McKanna v. Edgar*, 388 S.W.2d 927, 928 (Tex. 1965). Lack of personal jurisdiction can be waived by the party, and personal jurisdiction is presumed *in a collateral attack* on the judgment, whereas error in assuming constitutional or statutory jurisdiction not conferred upon the court in question can be neither waived nor ignored. *See Crawford v. McDonald*, 88 Tex. 626, 631-32, 33 S.W. 325, 328 (1895). This court has long recognized that there may be party issues, i.e., the matter is "a mere matter of procedure" as opposed to the constitutional or statutory *power* of a court to render judgment, that may be presumed as to either type of jurisdiction. *Id.* at 630, 33 S.W. at 327.

The majority should not adopt the federal courts' position that "standing" is jurisdictional. There is a fundamental difference between federal law and state law that controls here. Federal courts are courts of *limited* jurisdiction. *Marbury v. Madison*, 5 U.S.(1 Cranch) 137, 178-79, 2 L. Ed. 60 (1803). The parties asserting a claim must plead and prove (when not obvious) that jurisdiction exists. FED. R. CIV. P. 8(a). A party suing under a statute must establish his right to claim under that statute - his *standing* - in order to establish jurisdiction. *General Comm., Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas Ry. Co.*, 320 U.S. 323, 337-38 (1943). Consequently, standing is a part of jurisdiction under federal procedure, related to the "case" or "controversy" requirement of the federal constitution. *Association of Data Proc. Serv. Orgs. v. Camp*, 397 U.S. 150, 151 (1970). But there is no "case" or "controversy" limitation language in the Texas Constitution. In state courts of general jurisdiction, the power to entertain any suit not prohibited by either the federal constitution or federal law is *presumed*. *Cincinnati v. Louisville & N. Ry. Co.*, 223 U.S. 390, 56 L. Ed. 481, 32 S. Ct. 267 (1912). State courts have all residual jurisdiction that federal courts lack. *Id.*; *see generally* 2 CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW § 10:1 at 4-5 (1969). We should continue to recognize that "standing," like other procedural issues, may be waived. There is no reason to overrule the *Texas Industrial Traffic League* case, or its related progeny.

BOB GAMMAGE

JUSTICE

Opinion Delivered: March 3, 1993.

CONCURRING AND DISSENTING OPINION

Lloyd Doggett

"Don't Mess With Texas"

-- A motto that captures the Texas spirit.

Texans understand the directive "Don't Mess With Texas"; the majority does not. If the mess is big enough, if the stench is strong enough, no matter how great the danger to public health and safety, an industrial litterer can "mess" with Texas without fear of immediate punishment or legally effective citizen action.

And what an occasion for permitting polluters to "mess" with Texas air and water. Our state tops the nation in total toxic emissions and ranks dead last among the fifty states in important measures of
453 environmental quality. [29] Although last in air *453
and water cleanliness, Texas today becomes the first state to strike down the imposition of penalties by administrative agencies to enforce

statutes protecting the environment. I dissent from today's manipulation of the law to paralyze anti-pollution efforts, tragically announced at a time when protecting the quality of the air we breathe and the water we drink is so critical.

[29] Statistics compiled from data sent by companies to the Environmental Protection Agency show that in 1990 535.7 million pounds of toxic chemicals were released into the Texas environment, more than in any other state. Texas also ranked first in the release of chemicals known to cause both cancer and birth defects. *See* Texas Citizen Action, *Poisons in Our Neighborhoods, Toxic Pollution in Texas*, Sept. 1992, at 1; *see also* John Sharp, Texas Comptroller of Public Accounts, *Texas at Risk: Environmental Hazards Threaten State's Air, Land, and Water*, Fiscal Notes Aug. 1991 (noting the release of about 800 million pounds of toxic substances in 1989). Additionally, only two states ranked below Texas in the American Public Health Association's Pollution Standard Index, based on data gathered between 1989 and 1991. *See* American Public Health Ass'n, *America's Public Health Report Card: A State-by-State Report on the Health of the Public* 59 (1992).

Today's opinion delivers a double whammy to protection of our natural resources. Polluters are first shielded from swift punishment for harming our environment, and then the courthouse door is slammed shut in the face of Texans who organize to object. Incredibly, this second punch was not even sought by the corporate organization that brought this challenge; it was wholly designed by the majority during the three years that this cause has lingered in this court. Announced today is an easily manipulable "friends in, foes out" rule to prevent further actions by those who organize to protect taxpayers, consumers or the environment.

Through its broad writing designed to eviscerate administrative enforcement of our state's environmental laws, the majority has also created significant new uncertainties for a wide range of state governmental activity -- tax collection is imperiled, laws to protect nursing home residents are effectively voided, and even a leading weapon in the war on drugs is threatened. At a time of budgetary crisis exacerbated by the majority's great misadventure in public school finance, [30] today's opinion raises a substantial question of whether the State will be required to return to those who despoil Texas millions of dollars in administrative penalties collected during the almost eight years this case has wandered through the judicial system.

[30] *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 537 (Tex. 1992) (Doggett, J., dissenting).

This major blow to our environment is matched only by the threat to our system of justice lurking in the arcane language of today's opinion. Hidden within its lengthy legal mumbo-jumbo is an unprecedented blow to our jury system. The constitutional right of trial by jury, already suffering at the hands of this majority, is no longer inviolate; it may be abrogated at any time. Instead of walking into a courthouse, where a jury is guaranteed, citizens may be detoured to an administrative agency, to explain their problems to bureaucrats not directly answerable to the community.

Today precedent and tradition have been trampled as the majority's long-standing fear of ordinary people in our legal system has taken firm hold. The drafters of our Texas Constitution realized something that the majority has long ceased to appreciate -- ordinary Texans can make an extraordinary contribution to our system of justice. The more their collective voice expressed in a jury verdict is disregarded, the more new barriers are contrived to shut them out of our system of justice, the less justice that system will offer.

I. Open Courts

The ability of state agencies to enforce environmental laws through the assessment of administrative penalties is declared unconstitutional by the majority as contradicting our state guarantee of open courts. While concluding that TAB certainly has a right to judicial review on behalf of its members, I disagree that the statutory restrictions it challenges unreasonably restrict access to the courts.

Access to the courts is unquestionably a fundamental constitutional and common law right. Article I, section 13 of the Texas Constitution forms the nucleus of this protection:

454 *454 The open courts provision specifically guarantees all litigants the right to redress their grievances -- to use a popular and correct phrase, the right to their day in court. This right is a substantial state constitutional right.

LeCroy v. Hanlon, 713 S.W.2d 335, 341 (Tex. 1986) (citations omitted). This court has a long history of assuring that the right of access remains guaranteed to Texas citizens. [31]

31 *See, e.g., H. Runge & Co. v. Wyatt*, 25 Tex. Supp. 291 (1860) (placement of counties within judicial districts); *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (Tex. 1890) (striking requirement of supersedeas bond as a prerequisite to appeal); *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944 (1932) (requirement that city be notified of street defect within twenty-four hours of accident unreasonable restriction on right of access to courts); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983) (striking statute of limitations barring action of minor); *LeCroy*, 713 S.W.2d 335 (Tex. 1986) (holding unconstitutional increased filing fees designed to generate state revenues).

In *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983), we required a litigant alleging an unconstitutional denial of access to the courts to show that: (1) a cognizable common law cause of action is being restricted and (2) the limitation is unreasonable or arbitrary when balanced against the purpose and basis of the statute. The majority today appropriately eliminates the first showing in certain cases. In some circumstances the distinction between common law and statutory causes of action clearly does not affect whether access to the courts has been denied.

The second part of the *Sax* test, however, continues to be applied in all open courts cases. [32] Thus, in determining whether the open courts provision of the Texas Constitution is violated by the requirement that administrative penalties be paid as a prerequisite to judicial review, we must balance two competing interests: the right of TAB's members to access to the courts and the state's concern with effective and timely enforcement of its laws protecting the environment. The majority today restates in rather vague terms this second prong: "whether the prepayment requirement is an unreasonable financial barrier to access to the courts in light of the state interest involved." S.W.2d at . As we held in *LeCroy*:

32 Oddly, the majority asserts that "the *Sax* test is inapplicable" to today's open courts decision, S.W.2d at n.12, even as it explicitly relies on the analysis used in *LeCroy*, which in turn applied the *Sax* test. Nor does the majority attempt to explain how its analysis today differs from that employed in *Sax* and *LeCroy*.

Because a substantial right is involved, the legislature cannot arbitrarily or unreasonably interfere with a litigant's right of access to the courts. Thus, the general open courts provision test balances the legislature's actual purpose in enacting the law against that law's interference with the individual's right of access to the courts. *The government has the burden to show that the legislative purpose outweighs the interference with the individual's right of access*.

713 S.W.2d at 341 (citations omitted; emphasis supplied).

Applying this test, we have permitted certain restrictions on access to the courts, while disallowing others. *Compare LeCroy*, 713 S.W.2d at 341 (court filing fee unreasonably restricts access to judicial system), and *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303 (1890) (supersedeas bond as prerequisite to appeal, without regard to ability to pay, unconstitutional), *with Clanton v. Clark*, 639 S.W.2d 929 (Tex. 1982) (court may constitutionally dismiss suit for failure to timely file cost bond), and *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 122 Tex. 21, 52 S.W.2d 56 (1932) (requirement that franchise taxes be paid prior to filing suit upheld under article I, § 13); *compare Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (limitations on damages for medical malpractice unconstitutional), *with Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) (same limitations upheld under open courts provision in wrongful death cases). I favor a more complete and predictable open courts analysis designed to discourage such anomalous results.

455 *455 Today's implementation of the second prong of the *Sax* test demonstrates its malleability. After perfunctorily reciting the purpose of administrative penalties, the majority, without any further analysis, concludes that: "the forfeiture provision is an unreasonable restriction on access to the courts," S.W.2d at, and "the forfeiture provision serves no additional [state] interest." *Id.* at . Enacted by the Legislature as an important means of enforcing our state's environmental laws, these penalties are today judicially extinguished. The majority determines that these laudable legislative objectives are not sufficiently "important" to justify the possibility that the use of penalties may perhaps someday impose some slight financial strain on some hypothetical polluter.

Whether examined under either the vague test employed today or my more exacting formulation, the majority's conclusory analysis suffers from at least three major flaws: (1) a failure to recognize the compelling interest, grounded in our state constitution, served by administrative penalties, including prepayment provisions; (2) a disregard of the extensive statutory constraints on penalty usage which represents the least restrictive means to achieve this purpose; and (3) an assumption that the prepayment provision interferes with individual access to the courts unsupported by even a single specific instance of such a restrictive effect.

The balancing required by *Sax* mandates careful consideration of the rights being affected. The more significant the right the litigant asserts, the more onerous the government's burden becomes. TAB has asserted a right to judicial review of penalties imposed against its members. This interest is encompassed within the right of access to the courts, which we declared a "substantial state constitutional right." *LeCroy*, 713 S.W.2d at 341.

The State has met its burden by demonstrating a compelling interest in employing administrative penalties reflected in constitutionally-guaranteed protection of our state's natural resources. Although not critical in overcoming an open courts challenge, a constitutional predicate for the state's interest is a highly persuasive factor in the balancing process. As declared in article XVI, section 59(a) [33] :

> 33 This natural resources provision receives conflicting treatment in today's opinion, amply demonstrating both the malleability of the *Sax* test as applied by the majority and the majority's disdain for the right to trial by jury. While declaring that article XVI, § 59(a) will not permit payment of even the most modest penalties under our open courts provision, the majority inexplicably finds that it forms an insurmountable barrier to the right to jury

trial. The majority makes no attempt to reconcile its inconsistent analysis of these constitutional guarantees.

The preservation and conservation of all . . . natural resources of the State are each and all declared public rights and duties; and the Legislature shall pass all laws as may be appropriate thereto.

This very mandate of the people, as well as protection of the public health and safety was effectuated in the Clean Air Act, [34] the Texas Water Code, [35] and the Solid Waste Disposal Act, [36] including the right to assess administrative penalties. Protection of Texas' air, water and land is undeniably a compelling interest.

34 Tex. Health & Safety Code § 382.002, provides that:

It is the policy of this state and the purpose of this Act to safeguard the air resources of the state from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of health, general welfare, and physical property of the people, including the aesthetic enjoyment of the air resources by the people and the maintenance of adequate visibility.

35 Tex. Water Code § 26.003, provides that:

It is the policy of this state and the purpose of this subchapter to maintain the quality of water in this state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, and the economic development of the state . . ..

36 Tex. Health & Safety Code § 361.002, declares that:

It is the policy of this state and the purpose of this Act to safeguard the health, welfare, and physical property of the people, and to protect the environment, through controlling the management of hazardous wastes, including the accounting for hazardous wastes generated.

456 *456 The form of these particular administrative penalties has certainly been fashioned to serve this important state interest through the least restrictive means. Penalty usage is substantially limited and can in no way be said to be arbitrarily imposed. All three statutes at issue require that, once a violation is established, the agency assessing a penalty must consider such factors as the seriousness of the violation, including but not limited to the nature, circumstance, extent, and gravity of the prohibited acts; the hazard or potential hazard created to the public health or safety of the public; the history of previous violation; the amount necessary to deter future violations; and efforts to correct the violation. [37] There is thus statutory assurance that the amount of any resulting penalties will be directly related to the conduct.

37 Tex. Health & Safety Code § 382.088(c)(1-5) (Clean Air Act), § 361.251(c)(1-5) (Solid Waste Disposal Act); Tex. Water Code § 26.136(c). The Texas Water Code imposes additional considerations, including "the impact of the violation on a receiving stream or underground water reservoir, on the property owners . . . and on water users," as well as the extent of previous violations, the degree of culpability involved, any good faith effort to correct the violation and any economic benefit gained as a result of the illegal conduct. Tex. Water Code § 26.136(c).

Requiring that assessed penalties be paid, or a bond in the same amount be posted, prior to challenging the agency action in court is not unreasonable under these circumstances. Unlike the filing fee held violative of the open courts provision in *LeCroy*, the legislative purpose is not to raise money by making it more expensive for citizens to enforce their legal rights. Instead, the

legislative objective is to *deter and punish* violations of the law that pose an environmental threat.

The wheels of justice grind slowly, with final resolution often years in reaching. Indeed, in this court they sometimes hardly grind at all. Clearly those willing to profit from polluting our natural resources will not hesitate to employ the delays in the judicial system to their advantage. A declaration of bankruptcy by a perhaps deliberately undercapitalized corporation during the pendency of a suit is likely to relieve the polluter of any responsibility to remedy the damage it has caused.

Showing no awareness of the purpose of and need for administrative penalties, the majority finds that "expeditious payment" is adequately guaranteed by the ability of the agency, through the attorney general, to initiate an enforcement action to collect the amount assessed. S.W.2d at & n.15. In other words, the purpose of immediate deterrence of violation of environmental laws is ensured by the filing of a lawsuit that may take as many years to resolve as this case has. These agencies charged with protecting our natural resources have long had the ability to bring an enforcement action in state court. *See* Tex. Water Code § 26.123; Tex. Health & Safety Code § 382.081; *id.* § 361.224. The effort of the Texas Legislature to improve the effectiveness of enforcement through the use of administrative penalties is today rendered a nullity.

Given the time and expense that must be devoted to pursuing an enforcement action in court, the State will have the capability to proceed against only the most egregious wrongs. The vast majority of administrative penalties to date have been relatively small, reflecting technical yet important statutory violations. [38] In the absence of an administrative penalty power, most of these would have gone unpunished, even though collectively the environmental impact of small violations could be more profound than a major catastrophe. Relieving polluters from immediate sanctions dismantles the effectiveness of our laws protecting natural resources; no lesser means has been identified that provides for prompt enforcement. I would hold that the state has demonstrated a compelling interest in environmental protection that has been implemented by the least restrictive means, thus overriding any modest impediment that the prepayment of penalties may impose on access to the courts.

[38] See Appendices to Brief of Appellees Texas Air Control Board and Texas Water Commission.

457 *457 Not even the slightest evidence has been provided to this court to suggest any actual restrictive effect. No affidavit of any member of the Texas Association of Business appears in the record stating that an inability to pay an administrative penalty has barred judicial review. As to most of the penalties assessed, $ 5,000 or less in amount, it is doubtful that such a contention could be made. The majority necessarily concludes that imposing fines of $ 2,000 against Exxon Chemical Company, Shell Oil Company and Union Carbide Corporation has left those entities financially unable to pursue an appeal. [39] While the enormity of some future penalty could in fact unconstitutionally bar judicial access, that is certainly not the case here. *See Jensen v. State Tax Comm'n*, 835 P.2d 965, 969 (Utah 1992) (payment of assessed taxes, penalties and interest as precondition to suit "not unconstitutional in all cases," but only those in which taxpayer financially barred from prosecuting appeal); *see also Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex. 1985) (medical malpractice statute of limitations not unconstitutional as applied to facts of case).

[39] See Appendices to Brief of Appellees Texas Air Control Board and Texas Water Commission at 27, 44, 55.

Eliminating the need to prove actual restrictive effect, the majority declares "irrelevant" that "the affected parties may be able to afford prepayment." S.W.2d n.18. Unexplained is how this statement can be reconciled with *Dillingham*, in which this court found of critical importance the failure to accommodate those financially unable to post a supersedeas bond as a prerequisite to judicial review. Opining that "the guarantee of constitutional rights should not depend on the balance in one's bank account," *id.*, the majority would accord our state's largest businesses the same treatment as indigents in avoiding financial responsibility for court and other litigation costs.

Nor is the majority restrained by Texas decisional law validating similar requirements. We long ago upheld against this same type of challenge the condition that a corporation pay its franchise taxes in order to file a court action. *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 122 Tex. 21, 52 S.W.2d 56 (Tex. 1932); *accord Rimco Enterprises, Inc. v. Texas Elec. Svc. Co.*, 599 S.W.2d 362 (Tex. Civ. App.--Fort Worth 1980, writ ref'd n.r.e.). Various statutory requirements that taxes, penalties and interest be paid prior to contesting them in court have likewise sustained an open courts challenge. *See Filmstrips and Slides, Inc. v. Dallas Central Appraisal Dist.*, 806 S.W.2d 289 (Tex. App.--Dallas 1991, no writ) (property taxes); *Robinson v. Bullock*, 553 S.W.2d 196 (Tex. Civ. App.--Austin 1977, writ ref'd n.r.e.), *cert. denied*, 436 U.S. 918, 56 L. Ed. 2d 759, 98 S. Ct. 2264 (1978) (sales taxes).

The majority also ignores the certainty that far more than three statutes are impacted by today's decision. A broad range of regulatory enforcement programs vital to protection of the public health and safety will be stripped of their most timely and effective sanctions to deter harmful conduct. Laws designed to protect the old -- residents in nursing homes [40] -- the young -- our children away at camp [41] -- the sick and the injured, [42] and those we have lost [43] will be substantially weakened. Others, ensuring the sanitariness of food, drugs 458 and cosmetics, [44] as well as the slaughter and *458 disposition of dead animals, [45] will be similarly rendered less effective. [46] Even where such penalties have not been frequently enforced, their potential use may promote law enforcement.

40 *See* Tex. Health & Safety Code § 242.066 (administrative penalty for statutory violations "threatening the health and safety of a resident" of a convalescent or nursing home); *id.* § 242.069 (penalty must be prepaid or a bond posted prior to judicial review).

41 Tex. Health & Safety Code §§ 141.016-141.018 (providing for administrative penalties for violation of laws regulating youth camps and requiring their payment or the posting of a bond prior to judicial review).

42 Tex. Health & Safety Code §§ 773.065-.067 (administrative penalties to enforce Emergency Medical Services Act).

43 Tex. Rev. Civ. Stat. Ann. art. 4582b, § 6G (Vernon Supp. 1992) (administrative penalties for violation of statutes governing funeral directing and embalming).

44 Tex. Health & Safety Code §§ 431.054-.056 (Texas Food, Drug & Cosmetic Act); *id.* § 466.043 (regulation of narcotic drug treatment programs).

45 Tex. Health & Safety Code §§ 433.094-.096 (Texas Meat & Poultry Inspection Act); *id.* §§ 144. 081-.083 (Texas Renderers' Licensing Act).

46 *See also* Tex. Rev. Civ. Stat. Ann. art. 5069-51.17 (Vernon 1987 & Supp. 1992) (administrative penalties for violation of the Texas Pawnshop Act).

The most widespread damage, however, from today's decision will be in the enforcement of laws protecting our environment, where the Legislature has determined again and again that such penalties are the most effective means of assuring

compliance and preventing pollution of our air, water and land. [47] The majority ensures that those who pollute will be brought to justice very slowly or not at all.

47 Tex. Rev. Civ. Stat. Ann. art. 1446c, § 73A (Vernon Supp. 1992) (permitting assessment of civil penalty for violation of Public Utility Regulatory Act "resulting in pollution of the air or water of this state or posing a threat to the public safety"); Tex. Rev. Civ. Stat. Ann. art. 4477-3a, § 16 (Vernon Supp. 1992) (Texas Asbestos Health Protection Act); Tex. Rev. Civ. Stat. Ann. art. 5920-11, § 30 (Vernon Supp. 1992) (Texas Coal Mining and Surface Reclamation Act); Tex. Rev. Civ. Stat. Ann. art. 6053-2 (Vernon Supp. 1992) (safety standards for transportation of gas and for gas pipeline facilities); Tex. Rev. Civ. Stat. Ann. art. 8905, § 9 (Vernon Supp. 1992) (Water Well Pump Installers Act); Tex. Nat. Res. Code § 40.254 (Oil Spill Prevention and Response Act); *id.* § 81.0531-.0533 (assessment of penalties for violation of Railroad Commisssion statutes and rules "which pertain to safety or the prevention or control of pollution"); *id.* § 116.143-.145 (violation of laws relating to compressed natural gas "resulting in pollution of the air or water of this state or posing a threat to the public safety"); *id.* § 131.2661-.2663 (violations of Uranium Surface Mining and Reclamation Act "resulting in pollution of the air or water of this state or posing a threat to the public safety"); *id.* § 141.013-.015 (violation of geothermal resources regulations "pertaining to safety or the prevention or control of pollution"); *id.* Tex. Water Code 13.4151 (regulation of water and sewer utilities); *id.* § 27.1013-.1015 (Injection Well Act); *id.* § 28.067 (regulation of water wells and mine shafts); *id.* § 29.047 (Salt Water Haulers Act); *id.* § 33.009 (regulation of water well pump installers); Tex. Rev. Civ. Stat. Ann. art. 7621e, § 8A; Tex. Health & Safety Code § 372.004 (water saving performance standards); *id.* § 401.389 (Texas Radiation Control Act).

Other statutes that impose administrative penalties permit the filing of an affidavit of inability to pay in lieu of prepayment or the posting of a bond. [48] Because the majority's reasoning strikes down administrative penalties without reference to financial ability, S.W.2d at n., these statutes similarly cannot be enforced.

48 Tex. Ag. Code § 12.020 (L) (violation of agricultural statutes); *id.* § 76.1555 (failure to comply with pesticide regulations); Tex. Water Code § 34.011 (irrigation regulation); Tex. Rev. Civ. Stat. Ann. art. 41a-1, § 21D(f) (Vernon Supp. 1992) (public accounting); Tex. Rev. Civ. Stat. Ann. art. 135b-6, § 10B(k) (Vernon Supp. 1992) (Structural Pest Control Act); Tex. Rev. Civ. Stat. Ann. art. 5155, § 5(h) (Vernon Supp. 1992) (labor wage laws); Tex. Rev. Civ. Stat. Ann. art. 5282c, § 23A(k) (Vernon Supp. 1992) (Professional Land Surveying Practices Act); Tex. Rev. Civ. Stat. Ann. art. 6573a, § 19A(k) (Vernon Supp. 1992) (Real Estate License Act); Tex. Rev. Civ. Stat. Ann. art. 9100, § 17(m) (Vernon Supp. 1992) (Texas Department of Licensing and Regulation).

Today's writing poses a potentially crippling effect for collection of taxes. All of our state statutes in this area require that assessed taxes, penalty and interest be prepaid before a suit challenging them may be filed. *See generally* Tex. Tax Code §§ 112.051, 112.101. If such requirements are unconstitutionally void even to fulfill a constitutional mandate of environmental protection, their validity for tax collection is certainly subject to question. *See R Communications, Inc. v. Sharp*, 839 S.W.2d 947 (Tex. App.--Austin 1992, writ granted).

Nor has the majority sought to consider the consequences of its decision for a major weapon in the war against drugs, forfeiting *prior to*

judicial review money, vehicles and other property alleged to have been used in violating our criminal laws. Tex. Crim. Proc. Code art. 59.02-.011. Most frequently invoked to seize assets from drug dealers, such as money and cars that could finance their defense, this statute provides for the return of
459 property prior to trial only *459 on the posting of a bond for the full value. *Id.* art. 59.02(b).

Procedures within our judicial system are also threatened. Why is not the requirement that corporations and other organizations appear in court only through counsel a violation of the open courts provision, since the cost of retaining an attorney in most cases exceeds the average administrative penalty considered here?

Inadequately considered by the majority's opinion is its effect on the millions of dollars in administrative penalties that have already been paid under the statutes now declared unconstitutional. Yet, under the general rule that our decisions apply retroactively, past violators of environmental laws may stand to reap a substantial windfall. [49] In the firm grasp of this majority, "open courts" may have been rewritten to mean open coffers. While claiming that nothing in today's writing suggests that a refund is required, the majority apparently once again concludes that monies extracted by the state under the coercion of an unconstitutional system may be retained. *See Carrollton-Farmers Indep. Sch. Dist.*, 826 S.W.2d at 515-23 (holding tax unconstitutional, but requiring taxpayers to continue payment for two years).

49 Under recent and highly erratic writings determining retroactivity, of course, anything can happen. *See, e.g., Carrollton-Farmers Indep. Sch. Dist.*, 826 S.W.2d at 515-23; *Elbaor v. Smith*, S.W.2d (Tex. 1992) (creating uncertainty by disapproval of a type of pre-trial agreements previously upheld by this court).

The majority today throws a large wrench into the workings of the important administrative mechanism of our Texas government. By severely limiting enforcement powers, the majority leaves law enforcers little choice but to forego prosecution of law violators. Our laws designed to protect and conserve our natural resources are substantially weakened at the time their strength is most needed.

II. Trial by Jury

The harm caused to our environment by today's writing is equalled only by the severe blow struck against our fundamental right of trial by jury. In holding that TAB and its members have no right to a jury trial, the majority employs an analysis that has far-reaching ramifications. While I recognize the need to accommodate the evolution of the administrative state, the history of this important guarantee mandates that only the narrowest of exceptions be permitted.

The ability of each individual to have a case heard by other members of the community is a vital part of our heritage and law. Long ago, Texans emphasized the paramount importance of this guarantee, stating in their grievances against the Mexican government:

It has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizen.

The Declaration of Independence of the Republic of Texas (1836), *reprinted in* Tex. Const. app. 519, 520 (Vernon 1955). A strong guarantee of this right had been unsuccessfully sought in an 1833 draft constitution, [50] which was submitted to Mexico by Stephen F. Austin [51] and was later incorporated in the 1836 Texas Independence Constitution. [52]

50 "The right of trial by jury, and the privilege of the Writ of Habeas Corpus shall be established by law, and shall remain inviolable." *Proposed Constitution for the*

State of Texas art. 4 (1833), *reprinted in Documents of Texas History*, 80 (Ernest Wallace ed., 1963).

51 *See* Eugene C. Barker, *Stephen F. Austin, in The Handbook of Texas* 84 (Walter Prescott Webb ed., 1952).

52 Constitution of the Republic of Texas, Declaration of Rights, Section 9 (1836), *reprinted in* Tex. Const. app. 523, 536 (Vernon 1955), provided that "the right of trial by jury shall remain inviolate."

The central role of the jury as a democratic institution was firmly recognized, indeed celebrated, in our early jurisprudence by the Supreme Court of the Republic of Texas:

The institution of jury trial has, perhaps, seldom or never been fully appreciated. It has been often
460 eulogized in sounding *460 phrase, and often decried and derided. An occasional corrupt, or biased, or silly verdict is not enough for condemnation; and when it is said the institution interposes chances of justice and checks against venality and oppression, the measure of just praise is not filled. Its immeasurable benefits, like the perennial springs of the earth, flow from the fact that considerable portions of the communities at stated periods are called into the courts to sit as judges of contested facts, and under the ministry of the courts to apply the laws . . . . Let us then preserve and transmit this mode of trial not only inviolate, but if possible purified and perfected.

Bailey v. Haddy, Dallam 35, 40-41 (Tex. 1841). [53]

53 In our time this great constitutional principle continues to be reaffirmed:

It is fundamental to our system of justice and the intention and policy of the law to permit all persons to have a trial by jury of disputed fact issues essential for a determination of [their rights]. The right of trial by jury is a valuable right which should be guarded jealously by all state courts.

Steenland v. Texas Commerce Bank Nat'l Ass'n, 648 S.W.2d 387, 391 (Tex. App.--Tyler 1983, writ ref'd n.r.e.); *see also Lopez v. Lopez*, 691 S.W.2d 95, 97 (Tex. App.--Austin 1985, no writ) ("trial by jury should be granted zealously by all the courts of this state").

In 1845, expanding the scope of this right was the subject of spirited debate in the deliberations over the new constitution for statehood. In addition to the previous guarantee, which was carried forward in a new Bill of Rights, [54] further protection was included in the Judiciary Article. Tex. Const. art. IV, § 16 (1845). While under our national Constitution and those of almost all of our sister states trial by jury is available only for those actions that could have been brought at common law, the Texas Constitution since 1845 has also preserved that right in cases that historically would have been brought in equity. Thus, even when a private party seeks injunctive relief that will inure to the public's benefit, any derogation of the right to a jury nonetheless violates the Texas Constitution.

54 Tex. Const. art. I, § 12 (1845) (retaining identical language from 1836 provision).

Urging support of the additional Judiciary Article guarantee, Convention President Thomas Rusk declared:

It is a dangerous principle to trust too much power in the hands of one man. Would it not be better to trust a power of this nature in the hands of twelve men, than to confide it to the breast of one?

William F. Weeks, *Debates of the Texas Convention* 268 (1846). He was opposed by John Hemphill, later the first Chief Justice of this court, who actually "preferred the civil law" system, *id.* at 271-73, and Jefferson County delegate James Armstrong, who insisted the new section would "operate very injuriously." *Id.* at 270. He declared:

It would be better, in my opinion, to leave it to the legislature to apply these things; it is enough for us to say in the constitution that the trial by jury shall be preserved inviolate. If we intend the jury to determine every thing, it would be better to dispense with the judge altogether, as a useless appendage of the court.

Id. Today it is this same fear of juries, fortunately rejected in 1845, that now unfortunately prevails.

The original language providing for trial by jury in the Judiciary Article of 1845 was retained in later constitutions, Tex. Const. art. IV, § 16 (1861), Tex. Const. art. IV, § 20 (1866), but was thereafter extended to "all cases of law or equity." Tex. Const. art. V, § 16 (1869). It took its final form in our present Constitution of 1876, which continues to afford not one but two assurances on this vital subject:

In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right to trial by jury . . . .

Tex. Const. art. V, § 10.

The right of trial by jury shall remain inviolate.

Tex. Const. art. I, § 15. Rather than keeping it "inviolate," the majority today severely violates this right.

461 *461 Our heritage is now rejected by the majority in favor of a deliberately overbroad writing that treats trial by jury as a mere anachronism. This is consistent with the majority's increasing disfavor of decisionmaking by ordinary citizens composed as a jury. [55] Today's opinion insists that our constitutional assurance of trial by jury does not offer protection against legislative delegation of factfinding to an administrative bureaucracy. In essence, the majority engages in a massive redistribution of power from the people to the bureaucratic arm of state government. This extreme position is totally unjustified in view of the staunch legal and historical underpinnings of our constitutional commitment to afford Texans a jury of their peers.

55 *See, e.g.*, *May v. United Services*, ___ S.W.2d ___, ___ (Tex. 1992) (Doggett, J., dissenting); *Boyles v. Kerr*, ___ S.W.2d ___, ___ (Tex. 1992) (Doggett, J., dissenting); *Leleaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 55-56 (Tex. 1992) (Doggett, J., dissenting); *Reagan v. Vaughn*, 804 S.W.2d 463, 491 (Tex. 1991) (Doggett, J., concurring and dissenting); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 527 (Tex. 1990) (Doggett, J., dissenting).

Today's opinion accurately describes one element of the dual constitutional protection for this fundamental liberty:

Article I, section 15 of our constitution preserves a right to trial by jury for those actions, or analogous actions, tried to a jury at the time the constitution of 1876 was adopted.

S.W.2d at (footnote omitted). Then the majority grossly misconstrues this standard while making selective and misleading use of jurisprudence developed under the further guarantee of article V.

With its hangnail sketch of Texas history limited to one historian's very generalized description of Texas in the era "between 1835 and 1861", [56] S.W.2d at, the majority ignores our longstanding concerns regarding threats to our natural resources. As early as 1860, the Legislature acted to penalize polluters, providing that:

56 T.R. Fehrenbach, Lone Star: A History of Texas and the Texans 279 (1983).

If any person . . . shall in anywise pollute, or obstruct any water course, lake, pond, marsh or common sewer, or continue such obstruction or pollution so as to render the same unwholesome or offensive to the county, city, town or neighborhood thereabouts, or shall do any act or

thing that would be deemed and held to be a nuisance at common law, shall be . . . fined in any sum not exceeding five hundred dollars . . . . [57]

57 Act of Feb. 11, 1860, Tex. Gen Laws 97, a later version of which was referenced by this court in *Gulf, Colo. & Santa Fe Ry. v. Reed*, 80 Tex. 362, 15 S.W. 1105, 1107 (1891).

In an early decision considering whether a criminal nuisance was posed by a tallow factory near Galveston at which cattle were slaughtered and their carcasses and offal were allowed to accumulate, this court stated:

It requires no aid of the common law to convince any one accustomed to pure air, and who has been brought by accident or necessity within the sickening and malarious influence of one of our modern tallow and beef factories, that it is a disgusting and nauseous nuisance, even for miles around it . . . [those] so offending should be indicted and punished to the extent of the law.

Allen v. State, 34 Tex. 230, 233-34 (1871). How significantly has this court's once vigorous enforcement of anti-pollution laws waned.

Defilement of the environment was not only made punishable as a crime, but also subject to a common law action for nuisance. *See generally* Horace Wood, Wood's Law of Nuisances 501-21, 576-692 (2d ed. 1883) (discussing nuisance recovery at common law for various forms of air and water pollution). Such actions were regularly brought in Texas before 1876 to halt activities harmful to our air and water. In 1856, this court recognized that "what constitutes a nuisance is
462 well defined." [58] *462 *Burditt v. Swenson*, 17 Tex. 489 (1856). Considering an action to enjoin operation of a livery stable on Congress Avenue in Austin because "manure and filth has already accumulated to such an extent, that it now causes an unhealthy and disagreeable effluvia, exceedingly offensive and prejudicial," *id.* at 492, this court concluded such "noisome smells" constituted a nuisance. *Id.* at 502-03. In *City of Fort Worth v. Crawford*, 74 Tex. 404, 12 S.W. 52, 54 (Tex. 1889), an individual asserted that, because of the dumping of garbage, filth and bodies of dead animals on city land,

58 The court further stated: "The word means, literally, annoyance; in law, it signifies, according to Blackstone, 'anything that worketh hurt, inconvenience, or damage.' . . . . 'So closely (says Blackstone) does the law of England enforce that excellent rule of Gospel morality, of doing to others as we would they should do unto ourselves.'" *Id.* at 492. *Accord Miller v. Burch*, 32 Tex. 208, 210 (1869).

his home was rendered almost uninhabitable; his family and himself were kept in bad health; and he was, in the language of a witness, "a walking skeleton."

This court further observed that

The stench was so offensive that he had to shut the doors to eat and sleep. . . . The testimony shows that the filth on this place of deposit was so indescribable, and was so offensive as to make persons sick, and could be perceived a mile away.

Id. Affirming the judgment declaring the dump a common law nuisance, this court declared:

There is also no doubt that every person has a right to have the air diffused over his premises free from noxious vapors and noisome smells . . . .

Id. [59]

59 *See also Rhodes v. Whitehead*, 27 Tex. 304, 316 (1863)(remanding for trial a complaint against a dam across the San Antonio river, recognizing that the creation "of pools of stagnant and putrid water" or the "tendency to cause sickness in [the plaintiff's] family or immediate neighborhood," was sufficient to constitute a nuisance); *Jung v. Neraz*, 71 Tex. 396, 9 S.W. 344, 344-45 (1888) (nuisance properly alleged by claim that "interment of dead bodies in [proposed

> cemetery] would infect, poison, and injure [plaintiffs'] wells, and the use of low grounds, and further injure plaintiffs' health by the foul odors from the decomposition of said bodies.").

The majority's suggestion that "pollutants . . . are phenomena of relatively recent origin," S.W.2d at, is contradicted by the nineteenth century legislative response of criminalizing pollution and the common use of the common law of nuisance to fight soiling of the air and water. With the ongoing construction of the railroads, the mining of coal and sulphur, the emergence of industry and the nascence of our oil and gas industry, our state's natural resources were by no means pure and unthreatened in 1876. *See* James C. Cobb, Industrialization and Southern Society 1877-1984, 128 (1984) (describing pollution relating to increased rail usage, lumbering and urban sewage); *see also* Robert A. Calvert & Arnoldo De Leon, The History of Texas 186-191 (1990) (discussing the development of Texas industry in the late 1800's, including lumbering, beef processing and mining); Louis J. Wortham, 5 A History of Texas (1924) (examining industrial development in the nineteenth century). Only the scope and depth of the problem has changed. But even if the fouling of the environment were a recent technological "innovation" of the past century, that would be irrelevant. As I recently wrote in another context,

> The law is not irretrievably locked in the days before televisions and videocameras, nor limited to operators of telegraphs and horse-drawn carriages.

Boyles v. Kerr, ___ S.W.2d ___, ___ (Tex. 1992) (Doggett, J., dissenting). There is nothing about technological change that has made trial by jury any less vital. [60]

> 60 Although some critics allege that juries are not competent to deal with complex scientific and technological issues, empirical data demonstrates otherwise.
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> > Research shows . . . that the opportunity exists for meaningful [juror] participation in a wide range of adjudicatory and regulatory proceedings. . . . To the extent that juries encounter difficulties, these difficulties often vex judges as well. . . . The full potential of lay participation in adjudication has not been realized.
> >
> > Joe Cecil, Valerie Hans, and Elizabeth Wiggins, *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 Am. U. L. Rev. 727, 773-74 (1991).

But because there was no modern bureaucracy in 1876, the majority insists: "no governmental schemes akin to these existed." *Id.* at . While our laws and society have grown more complicated, 463 the mandate *463 of our constitution has not. As we concluded in *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 292 (Tex. 1975): "The right to a trial by jury is not limited to the precise form of action . . . at common law." If there was an analogous cause of action with a right to jury trial in 1876, then our article I jury trial guarantee requires it today. Yet the majority ignores the fact that even the earliest of pollution statutes was designed to deter and punish those who harm our environment. Our jury trial article is thus decreed as dependent on form, not substance; not analogy, but exactitude. Under the majority's analysis, *Credit Bureau* was wrongly decided since a regulatory prohibition against deceptive non-disclosure or ambiguous language with the capacity to deceive was beyond the "deceptive acts" of common law fraud or deceit as it existed in 1876.

Seizing upon the rather obvious proposition that the administrative state had not yet been created in 1876, the majority concludes that there is no right to trial by jury in judicial review of an administrative proceeding. But under article I it is the nature of the cause of action that controls, not the procedures under which it is enforced. Each of the three statutes considered today defines

"pollution" of air, water or land to incorporate early nuisance concepts. Tex. Health & Safety Code § 382.003(3)(contaminants that "are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property [or] interferes with the normal use and enjoyment of animal life, vegetation, or property"); *id.* § 361.003(44) ("contamination of any land land or surface or subsurface water in the state that renders the land or water harmful, detrimental, or injurious to humans, animal life, vegetation"); Tex. Water Code § 26.001(13) (contamination that "renders the water harmful, deterimental, or injurious to humans, animal life, vegetation, or property"). The majority fails to examine these provisions and makes no attempt to distinguish their substance from nuisance actions at the time the constitution was adopted. The focus must be on the nature of civil and criminal nuisance actions as they existed in 1876, not on whether administrative agencies existed then to bring such actions. That the creation of some administrative agency was not contemplated in 1876 does not mean that any type of factfinding transferred to that agency in 1993 or hereafter is beyond the purview of a jury. With its new approach, the majority is only clearing the way for a steady expansion of factfinding and decisionmaking by bureaucracy at the expense of trial by jury.

Concluding that no common law action analogous to the assessment of administrative penalties existed in 1876, the majority professes a superficial limit on its holding tied to article XVI, § 59(a) of the Texas Constitution, as interpreted in *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961 (1945). S.W.2d at n.24. Nothing in this provision affects the determination of whether a nuisance action for pollution is analogous to an enforcement action for the same conduct. Clearly, the majority's reasoning rests solely on the fact that no administrative agency was charged in 1876 with protecting the state's resources. Nor does *Corzelius* in any way address the right to jury trial.

Under the majority's asserted "narrow" holding, the right to trial by jury can be immediately abrogated in any case in which natural resources are even remotely involved, including private disputes that this court has held are subject to jury trial, such as those involving mineral ownership, contract rights, or mineral lease terms. *See, e.g., Amarillo Oil Co. v. Energy-Agri Prod., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990).

The constitutional limitation on legislative power to delegate away the people's right to trial by jury was amply demonstrated by the writing of this court in *White v. White*, 108 Tex. 570, 196 S.W. 508 (Tex. 1917). There a husband had his wife, who apparently did not contest that she was a "lunatic," committed to a state asylum. Commitment proceedings had been statutorily transferred to a "commission" appointed by a county judge and comprised of six members, "as many of [whom] shall be physicians as may be
464 possible." Act of *464 April 8, 1913, 33rd Leg., ch. 163, art. 152, 1913 Tex. Gen. Laws 342. Although a review of decisions of other states and of federal practice indicated substantial support for what appeared to be a quite reasonable legislative attempt to entrust the determination of mental competency to the expertise of the medical profession, 196 S.W. at 514-15, this Court rightly concluded there that

> trial by jury means something more than a hearing before a commission. . . .

Id. at 511. Such "a hearing before a commission, in lieu of the time-honored trial by jury, is invalid." *Id.* at 515. Moreover,

> [contrary] reasoning [in other jurisdictions] as to the right of the legislature to dispense with jury trials is not applicable to our judicial system and laws, and it is obnoxious to our [Texas] Constitution . . . ."

Id. I maintain that the wholesale transfer of authority for factfinding from juries to the bureaucracy announced here is no less offensive to

the rights our Constitution guarantees.

Beginning with the constitutional amendment that led to the creation of the Railroad Commission, [61] the use of administrative agencies in Texas has steadily increased. Today this arm of government implements broad legislative plans regulating many areas of public concern, including the conduct of public utilities, the development and conservation of energy resources, and the protection of the environment.

[61] *See* Tex. Const. art. X, § 2 and interp. commentary (Vernon 1955) (noting that the provision was added to authorize the Legislature to regulate railroads after the people had issued strong complaints against them).

To preserve the workings of modern government, some exception for administrative proceedings may be necessary, but it should be drawn narrowly so as not to encompass every conceivable action that could arguably be assigned to some existing or future administrative body. And that is precisely what, until today, our Texas courts have usually done. In two decisions concerning administrative cancellation of a permit to sell liquor, courts narrowly recognized that no "cause of action" was involved. The court in *Bradley v. Texas Liquor Control Bd.*, 108 S.W.2d 300 (Tex. Civ. App.--Austin 1937, writ ref'd n.r.e.), specifically excluded from its ruling cases "based upon a civil right of [an individual] to compensation." Relying on *Bradley*, [62] the court in *Texas Liquor Control Bd. v. Jones*, 112 S.W.2d 227, 229-30 (Tex. Civ. App.--Texarkana 1937, no writ), noted that unlike other administrative proceedings that might involve rights of the same character as a "cause of action," the cancellation of a liquor license is a proceeding brought by the state pursuant to its police power to protect the "welfare, health, peace . . . and safety of the people of Texas."

[62] *See also State v. De Silva*, 105 Tex. 95, 145 S.W. 330 (Tex. 1912) (also holding that cancellation of liquor license is not a "cause").

This concern for "the safety of the people of Texas" -- the rights and needs of the public, *id.*, is not dissimilar from the doctrine of "public rights" rather imperfectly employed by the federal courts. State cancellation of a liquor license essentially represents a "public right." In *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977), the court distinguished between cases involving governmental action to protect the public health and safety and those involving only private rights:

At least in cases in which "public rights" are being litigated -- e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes . . . [the constitutional right to a jury trial] does not prohibit . . . assign[ment of] the factfinding function to an administrative forum with which the jury would be incompatible.

Id. at 450.

Bradley and *Jones* are also consistent with writings in other jurisdictions strictly excluding from any administrative public rights exception
465 actions invoking private *465 rights for which the Constitution mandates a right to trial by jury:

Although the award of general compensatory damages may have substantive effect, in that it deters violation of the regulatory scheme . . . when the damages awarded advance a substantial private interest in remuneration that is disproportionate to the concept of public relief, the right to a jury trial is implicated and a jury is required.

McHugh v. Santa Monica Rent Control Bd., 49 Cal. 3d 348, 777 P.2d 91, 117 (Cal. 1989) (Panelli, J., concurring); *Bishop Coal Co. v. Salyers*, 380 S.E.2d 238, 246 (W.Va. 1989) (subjective determinations of damages are constitutionally entrusted to juries); *Broward County v. La Rosa*, 505 So.2d 422, 424 (Fla. 1987) (constitutional right to jury precludes administrative awards of unliquidated damages).

Fortunately the rights of Texans are not constrained by whether the right to a jury trial was preserved in analogous actions in 1876. We have written quite clearly that an even broader right to trial by jury is afforded under article V, section 10 than under article I, section 15. [63] *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 292 (Tex. 1975). Relying on *Walsh v. Spencer*, 275 S.W.2d 220, 223 (Tex. Civ. App.--San Antonio 1954, no writ), which described the "much broader guarantee" of the Judiciary Article, and *Tolle v. Tolle*, 104 S.W.2d 1049, 1050 (Tex. 1907), which said of the provision, "language cannot be more comprehensive than this," we expressly disapproved of earlier cases "mistakenly" treating the two provisions

> 63 In the commentary for recommended article V, section 14(e) of the proposed 1974 Constitution, the significance of holdings regarding this more expansive language was also noted:
>
> The right of trial by jury guaranteed in Article V, Section 10 of the 1876 Constitution is not dependent on the existence of the right at the time the Constitution was adopted in 1876. The guarantee extends to any "cause" instituted in the district court. A "cause" is defined as a suit or action concerning any question, civil or criminal, contested before a court of justice.
>
> *See* Texas Constitutional Revision Commission, *A New Constitution for Texas: Text, Explanation, Commentary* 120-21 (1973).

as identical in meaning, that is, as protecting the right of trial by jury only as it existed at common law or by statutes in effect at the time of the adoption of the Constitution.

530 S.W.2d at 292 (citing *Hickman v. Smith*, 238 S.W.2d 838 (Tex. Civ. App.--Austin 1951, writ ref'd), as improperly assigning the two provisions equivalent meaning). We held that the Judiciary Article affords a unique right to trial by jury even for causes of action unknown at the time of the Constitution's adoption. *Id.* [64]

> 64 The *Credit Bureau* opinion was authored for the court by now former Chief Justice Jack Pope, who had written previously, "the struggle for survival by the institution we call the jury is truly the epic of our law." Jack Pope, *The Jury*, 39 Tex. L. Rev. 426 (1961). That struggle continues today.

Instead of heeding this holding, the majority seizes upon a citation to a commentary in that writing as an excuse to rewrite the Constitution. In the discussion of the article V jury trial guarantee in *Credit Bureau*, which involved no administrative action, we noted a few "isolated" proceedings that do not constitute a "cause" that have been identified on a "case-by-case determination." *Id.* at 293. We made shorthand reference to a commentator's brief list of exceptions carved from the otherwise inviolate right to trial by jury. *Id.* (citing Whitney R. Harris, *Jury Trial in Civil Cases -- A Problem in Constitutional Interpretation*, 7 Sw. L.J. 1, 8 (1953) (listing child custody by habeas corpus and adoption proceedings, election contests, and contempt proceedings)). Additionally, Harris relied upon *Jones* for the broader proposition that proceedings originally brought before administrative agencies are excepted from constitutional jury rights. 7 Sw. L.J. at 12-13. [65]

> 65 Though he wrote in unnecessarily global terms regarding this exception, even Harris recognized that
>
> the plain language of the Judiciary section conferring the right of trial by jury in all causes in the district courts would seem to entitle parties to jury trials irrespective of whether that right existed at the time of the adoption of the Constitution.
>
> Harris, *supra*, at 6-7.

466 *466 Today the majority overexpands this exception before considering the rule it prefers that exception to swallow. In *Credit Bureau* we attributed "broad meaning [to] the word 'cause.'" 530 S.W.2d at 292. In defining it, we did not limit its meaning in the past, but turned to a relatively contemporary dictionary as well as older authority. *Id.* Clearly this term must adapt to modern developments; our understanding of a "cause" is not frozen in 1876. *See Davenport v. Garcia*, 834 S.W.2d 4, 19 (Tex. 1992). Both the text of our Constitution and its historical backdrop demand that the right to trial by jury remain "inviolate." When, as here, however, changing circumstances require reexamination of the scope of this right in order to preserve the evolved workings of government, we must ensure that any exception does not destroy the guarantee. [66] We should instead follow the command of our Constitution in light of our contemporary situation, by limiting any exception in the most narrow way possible without completely undermining the administrative state.

66 The majority notes the existence of other statutory procedural protections, such as those contained in the Administrative Procedure and Texas Register Act, Tex. Rev. Civ. Stat. art. 6252-13a, § 19(e). S.W.2d at n.26. While important, these measures certainly do not constitute a complete substitute for a jury trial. If the Texas Constitution guarantees a right to trial by jury, no lesser protection will suffice.

I would accordingly clarify any existing exception for administrative proceedings to preserve the right to trial by jury in all suits except those in which the state is enforcing a regulation or statute protecting the public. If construed too broadly, however, even this exception limited to "public rights" could destroy our traditional reliance on the jury system. [67] Indeed, despite the writing in *Atlas Roofing*, such erosion has already begun at the federal level. [68] Properly limited, however, a "public rights" administrative exception to the right to trial by jury is both constitutionally sound and easy to apply. While perhaps far-reaching in other contexts, "public rights" that conflict with the right of each member of the public to have factual disputes resolved by a public jury must be narrowly construed. I would not permit the concept of "public rights" to be perverted to deny such a fundamental right. In this limited circumstance, I would define proceedings involving "public rights" as those in which the government, as a real party in interest, enforces a regulatory or statutory scheme. Contrary to the majority, I do not suggest that we follow its standard preference for copying a "federal test," S.W.2d at n.24. Rather, I recommend a narrow and clear Texas standard that looks to Texas law predating *Atlas Roofing*, and which learns from the misapplication of this doctrine in the federal courts.

67 To some extent every action legislatively entrusted to an administrative agency involves a public right. At the same time even actions by private parties may have incidental regulatory effects and are unquestionably invested with a public interest. *See The Dallas Morning News, Inc. v. Fifth Court of Appeals*, ___ S.W.2d ___, ___ (Tex. 1992, orig. proceeding) (Doggett, J., dissenting from overruling of motion for leave to file petition for writ of mandamus).

68 The "public rights" concept has been recently muddled by the federal courts. In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 106 L. Ed. 2d 26, 109 S. Ct. 2782 (1989), the court, although upholding the right to a jury trial for defendants sued for fraudulent conveyance by a trustee in bankruptcy, broadened the scope of its "public rights" exception to include all cases "involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency." *Id.* at 55 n.10. *See also Thomas v. Union*

> *Carbide Agric. Prod. Co.*, 473 U.S. 568, 586 (1985) (rejecting the view that the government must bring suit in order for litigation to involve "public rights"). I believe that such an expansive reading of "public rights" would not be consistent with the broad state constitutional protection of the right to trial by jury in Texas.

Here TAB's members are not entitled to a jury trial because the state is enforcing public regulations by imposing administrative penalties. Although this action is analogous to a common law nuisance claim, here the state is protecting the public's right
467 to a clean environment rather than an *467 individual's use and enjoyment of private property.

The right to trial by jury is a critical state constitutional guarantee. Denigrating my concern with protecting this liberty, the majority dismisses my writing as "trumpeting." S.W.2d at n.23. The trumpet call has sounded from the very earliest days of our Republic, heralding our right to trial by jury, a clarion to our citizens to shout out to preserve their heritage against attack. It demands that any intrusion on this right be narrow in scope, clearly-announced and thoughtfully considered. The majority's refusal to define with certainty its erosion of the right to trial by jury sounds a weak and shaky chord, reflecting a lack of commitment to this fundamental guarantee. Attempting to let the strong note drown the weak, the majority seeks to hide its equivocation by reference to my conclusion that a jury trial is not required under these anti-pollution statutes, *id.*, and by criticizing the narrow, clear and thoughtful exception I have drawn today. *Id.*

The inviolate nature of the right to trial by jury demands that this vital guarantee be circumscribed in only the most extraordinary circumstances and that any exception to it be clearly and narrowly construed. Although I do not disagree with the result announced by the majority, the analysis employed is designed to destroy one of our most precious freedoms as Texans. The alternative I offer would permit our administrative bodies to implement efficiently their regulations, while ensuring that efficiency concerns do not envelop a fundamental civil liberty. [69]

> 69 In view of recent attacks nationwide on the jury system, a recent study determined that
>
> Our central conclusion is that the civil jury system is valuable and works well. . . . It is [not] "broken," and therefore it need not be "fixed." The jury system is a proven, effective, an important means of resolving civil disputes.
>
> The Brookings Institution, Charting a Future for the Civil Jury System 2 (1992).

III. Standing

The issue of standing is a stranger to this litigation. No party before this court has ever asserted that the Texas Association of Business lacked capacity to challenge the actions of state government. How rare the occasion when all litigants agree

on the proper resolution of an issue, but how truly extraordinary is such unanimity when the parties are two state regulatory agencies, the Texas Association of Business, the Sierra Club and the League of Women Voters. This, nonetheless, is the exceptional circumstance in which we find ourselves today as all of these diverse parties have urged the court not to decide this matter in the manner adopted. Addressing the question of standing solely at the belated insistence of the majority, all parties asserted that this issue was not in dispute; that, under recent precedent, standing had been waived; [70] and, alternatively, that the record adequately demonstrated the right of the Texas Association of Business under Texas law to initiate this litigation. Why then does the majority insist on writing? Because it dare not pass up the opportunity to close access to our courts to those citizens who choose to challenge environmental degradation, neighborhood destruction and consumer abuse. Through a narrowly crafted test,

the majority extends an invitation to TAB to come into the courts while telling other public interest groups to stay out.

> [70] As the majority recognizes, "the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal." S.W.2d at .

While devoting over half of today's opinion to a nonissue in this litigation, the majority oddly limits its inquiry to only one of the three organizations asserting standing here. Nothing is said as to the League of Women Voters and the Sierra Club, both of which intervened in the trial court and were aligned as defendants with the State. Asserting the interests of its members in water and air quality, as well as its involvement in protecting the state's natural resources, the League of Women Voters claimed standing to defend the challenged regulations. Similarly, the Sierra Club
468 *468 based its standing on its purpose of environmental enhancement and conservation of natural resources. By completely ignoring whether these groups were proper parties and by embracing a federal standing test hostile to their participation, the majority erects new barriers to deny Texans access to Texas courts.

To achieve this result, the majority must overcome what, until recently, was viewed as a considerable obstacle -- Texas law. This court has repeatedly held that the issue of standing may not be raised for the first time on appeal, either by the parties or by the court. In *Texas Industrial Traffic League v. Railroad Comm'n of Texas*, 633 S.W.2d 821, 822-23 (Tex. 1982), we concluded:

A party's lack of justiciable interest must be pointed out to the trial court . . . in a written plea in abatement, and a ruling thereon must be obtained or the matter is waived.

No plea challenging the standing of [the party] was filed in the district court. The issue of standing was therefore waived, and the court of appeals erred in writing on the issue at all.

(Emphasis supplied). The sole issue presented in *Coffee v. William Marsh Rice University*, 403 S.W.2d 340 (Tex. 1966), was whether the court of appeals erred in dismissing a case, on its own motion, for want of standing. This court held that, because standing had not been challenged in the trial court, that issue could not deprive the court of appeals of subject matter jurisdiction. *Id.* at 347-48. Assuming that standing was lacking in *Sabine River Authority of Texas v. Willis*, 369 S.W.2d 348, 349-50 (Tex. 1963), [71] this court nonetheless held that dismissal was erroneous, because the absence of a justiciable interest was not first raised in the trial court. We have repeatedly cited these decisions with approval. *See Central Educ. Agency v. Burke*, 711 S.W.2d 7, 8 (Tex. 1986) (per curiam); *American General Fire & Casualty Co. v. Weinberg*, 639 S.W.2d 688 (Tex. 1982); *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982) (per curiam).

> [71] Despite the clear statement in *Sabine River* that "we assume without deciding that Sabine has no justiciable interest," 369 S.W.2d at 349, the majority today asserts that "standing was present" in the trial court in that case. S.W.2d at n.9.

Time and time again, the courts of appeals have also refused to consider challenges to standing not first raised in the trial court. [72] Until today, the only criticism of our prior holdings to this effect
469 has *469 consisted primarily of writings authored by one appellate judge. [73]

> [72] *See, e.g.*, *Espiricueta v. Vargas*, 820 S.W.2d 17, 20 (Tex. App.--Austin 1991, writ denied); *Integrated Title Data Systems v. Dulaney*, 800 S.W.2d 336 (Tex. App.--El Paso 1990, no writ); *State v. Euresti*, 797 S.W.2d 296, 299 (Tex. App.--Corpus Christi 1990, no writ); *Cissne v. Robertson*, 782 S.W.2d 912, 917 (Tex. App.--Dallas 1989, writ denied); *Broyles v. Ashworth*, 782 S.W.2d 31, 34 (Tex. App.--Fort Worth 1989, no writ); *Horton v. Robinson*, 776 S.W.2d 260, 263 (Tex. App.--El Paso 1989,

no writ); *L.G. v. State*, 775 S.W.2d 758, 760 (Tex. App.--El Paso 1989, no writ); *Wilson v. United Farm Workers of America*, 774 S.W.2d 760, 764 (Tex. App.--Corpus Christi 1989, no writ); *Smiley v. Johnson*, 763 S.W.2d 1, 4 (Tex. App.--Dallas 1988, writ denied); *Ex Parte McClain*, 762 S.W.2d 238, 242 (Tex. App.--Beaumont 1988, no writ); *Goeke v. Houston Lighting & Power Co.*, 761 S.W.2d 835, 837 n.1 (Tex. App.--Austin 1988), *rev'd on other grounds*, 797 S.W.2d 12 (Tex. 1990); *Group Medical and Surgical Service, Inc. v. Leong*, 750 S.W.2d 791, 794-95 (Tex. App.--El Paso 1988, writ denied); *City of Fort Worth v. Groves*, 746 S.W.2d 907, 913 (Tex. App.--Fort Worth 1988, no writ); *Barron v. State*, 746 S.W.2d 528, 530 (Tex. App.--Austin 1988, no writ); *Reynolds v. Charbeneau*, 744 S.W.2d 365, 367 (Tex. App.--Beaumont 1988, writ denied); *Champion v. Wright*, 740 S.W.2d 848, 851 (Tex. App.--San Antonio 1987, writ denied); *Texas Low-Level Radioactive Waste Disposal Authority v. El Paso County*, 740 S.W.2d 7, 8 (Tex. App.--El Paso 1987, writ dism'd w.o.j.); *S.I. Property Owners' Ass'n v. Pabst Corp.*, 714 S.W.2d 358, 360 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.); *Gonzales v. City of Lancaster*, 675 S.W.2d 293, 294-95 (Tex. App.--Dallas 1984, no writ); *Mabe v. City of Galveston*, 687 S.W.2d 769, 771 (Tex. App.--Houston [1st Dist.] 1985, writ dism'd); *Develo-cepts, Inc. v. City of Galveston*, 668 S.W.2d 790, 793 (Tex. App.--Houston [14th Dist.] 1984, no writ); *Griffith v. Pecan Plantation Owners Ass'n, Inc.*, 667 S.W.2d 626, 628 (Tex. App.--Fort Worth 1984, no writ); *City of Houston v. Public Utility Comm'n of Texas*, 656 S.W.2d 107, 110 n.1 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *Public Utility Comm'n v. J.M. Huber Corp.*, 650 S.W.2d 951, 955-56 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *Vaughn Bldg. Corp. v. Austin Co.*, 620 S.W.2d 678 (Tex. App.--Dallas 1981), *aff'd*, 643 S.W.2d 113 (Tex. 1982); *War-Pak, Inc. v. Rice*, 604 S.W.2d 498 (Tex. App.--Waco 1980, writ ref'd n.r.e.).

[73] *Texas Dep't of Mental Health v. Petty*, 778 S.W.2d 156, 166 (Tex. App.--1989, writ dism'd w.o.j.) (opinion by Powers, J.); *Public Utility Comm'n v. J.M. Huber Corp.*, 650 S.W.2d 951, 954-56 (Tex. App.--Austin 1983, writ ref'd n.r.e.)(opinion by Powers, J.); *Hooks v. Texas Dep't of Water Resources*, 645 S.W.2d 874 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (opinion by Powers, J.); *see also Kircus v. London*, 660 S.W.2d 869, 872 n.3 (Tex. App.--Austin 1983, no writ) (opinion by Phillips, C.J.).

The majority has a simple way to deal with this venerable body of law -- overrule only one case, making today's abrupt change in the law appear less drastic, while ignoring the rest. In fact, six Texas Supreme Court cases must be overruled and no less than twenty-five decisions of the courts of appeals must be disapproved to reach today's result. The concept of reliance on the prior decisions of Texas courts has long since ceased to offer the slightest restraint on this majority. [74]

[74] *See, e.g.*, *Boyles v. Kerr*, S.W.2d, (Tex. 1992) (Doggett, J., dissenting) (objecting to majority's overruling of landmark Texas Supreme Court decision permitting recovery for negligence resulting in emotional distress); *Walker v. Packer*, 827 S.W.2d 833, 835 (Tex. 1992, orig. proceeding) (Doggett, J., dissenting) (noting majority's "mass execution of precedent," encompassing "a dozen or more Texas Supreme Court cases and countless decisions of the courts of appeals"); *Carrollton-Farmers Branch Indep. Sch. Dist.*, S.W.2d at (Tex. 1992) (Doggett, J., dissenting) (discussing rejection by majority of its own decision issued less than one year previously); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 12 (Tex. 1991) (Doggett, J., dissenting) (majority disregards its own recent precedent, looking instead to

overruled case); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 852 (Tex. 1990) (Doggett, J., dissenting) (disapproving of rejection of recent controlling precedent).

Bulldozing a new path through this jurisprudential forest, the majority vaults standing to a new and remarkable prominence by suddenly discovering that it has not just one but two constitutional bases. And what unusual constitutional pillars each of these new finds represents. First, the proscription of the separation of powers doctrine against issuance of advisory judicial opinions allegedly requires rigorous enforcement of standing even when no party debates its existence. This link between standing and separation of powers is not predicated on any directly relevant prior court decision, [75] but instead is entirely premised on an article openly antagonistic to standing for environmental groups. S.W.2d at, citing Atonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983). The current majority may be the first in the nation to anchor standing on this constitutional theory.

[75] The United States Supreme Court has clearly stated that standing does not implicate separation of powers concerns. *See Flast v. Cohen*, 392 U.S. 83, 100, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968) ("The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of . . . Government.").

The authorities addressing the prohibition on advisory opinions cited in support of this proposition, of course, in no way implicate the question of standing. This precedent-setting concern with advisory opinions contrasts markedly with the eagerness to issue this very type of writing within the last year. *See Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 501 (Tex. 1991) (Doggett, J., concurring); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 537 (Tex. 1992) (Doggett, J., dissenting) (advisory opinions issued and retracted as necessary to thwart efforts to satisfy the constitutional command of equity and efficiency in our public schools). Writing on an issue not raised by any party, as the majority reaches out to revise the law of standing today, seems to me the very essence of an "advisory" opinion.

The second newly-announced constitutional basis is equally ironic -- our state's vital guarantee that "all courts shall be open," Tex. Const. art. I, § 13, in some inexplicable way, mandates that they be closed to some and requires continual judicial monitoring of all who attempt to enter. No
470 authority of any type is cited for this *470 proposition that "open" courts really means "closed" courts. Nothing in the history or text of the provision justifies this reading nor has any Texas court previously attempted such converse interpretation. This constitutional guarantee is used today as a two-edged sword: the majority invokes the open courts provision to bar environmental groups from seeking judicial assistance in enforcing the laws, while in the very same opinion misinterpreting this provision to allow continued violation of statutes protecting our precious natural resources. [76]

[76] *See* section I, *supra*.

Then, with a final flourish, standing is conveniently classified as a nonwaivable component of subject matter jurisdiction. Until today, Texas followed the rule, adopted by many of our sister states considering the issue, that objections to a party's standing are waived if not first raised in the trial court. [77] No Texas case is cited for the proposition that standing is part of nonwaivable subject matter jurisdiction because, until today, this court had repeatedly stated precisely the very opposite -- that standing is not jurisdictional. [78]

[77]

See, e.g., *Brown v. Robinson*, 354 So. 2d 272, 273 (Ala. 1977); *Jackson v. Nangle*, 677 P.2d 242, 250 n.10 (Alaska 1984); *Torrez v. State Farm Mut. Auto Ins. Co.*, 130 Ariz. 223, 635 P.2d 511, 513 n.2 (Ariz. App. 1981); *Cowart v. City of West Palm Beach*, 255 So. 2d 673, 675 (Fla. 1971); *Lyons v. King*, 397 So.2d 964 (Fla. App. 1981); *Greer v. Illinois Housing Development Auth.*, 524 N.E.2d 561, 582 (1988); *Matter of Trust of Rothrock*, 452 N.W.2d 403, 405 (Iowa 1990); *Tabor v. Council for Burley Tobacco, Inc.*, 599 S.W.2d 466, 468 (Ky. App. 1980); *Sanford v. Jackson Mall Shopping Ctr. Co.*, 516 So. 2d 227, 230 (Miss. 1987); *Fossella v. Dinkins*, 66 N.Y.2d 162, 495 N.Y.S.2d 352, 485 N.E.2d 1017, 1019 (1985); *Public Square Tower One v. Cuyahoga County Bd. of Revision*, 516 N.E.2d 1280, 1281 n.2 (Ohio App. 1986); *Federman v. Pozsonyi*, 365 Pa. Super. 324, 529 A.2d 530, 532 (Pa. Super. 1987); *McMullen v. Zoning Board of Harris Township*, 494 A.2d 502 (Pa. Commw. Ct. 1985); *International Depository, Inc. v. State*, 603 A.2d 1119, 1122 (R.I. 1992); *State v. Miller*, 248 N.W.2d 377, 380 (S.D. 1976); *Princess Anne Hills Civ. League, Inc. v. Susan Constant Real Estate Trust*, 243 Va. 53, 413 S.E.2d 599, 603 n.1 (Va. 1992); *Tyler Pile Industries, Inc. v. State Dep't of Revenue*, 714 P.2d 123, 128 (Wash. 1986); *Poling v. Wisconsin Physicians Serv.*, 120 Wis. 2d 603, 357 N.W.2d 293, 297-98 (Wisc. App. 1984). The majority's odd attempt to distinguish some of these cases, all of which are predicated in terms of standing, as involving solely the question of whether the litigant was a proper "real party in interest" has never been drawn previously in the published decisions of any Texas court addressing the question of standing. *See* cases cited at notes 44, *supra*, and 50, *infra*.

78 *See Texas Industrial Traffic League*, 633 S.W.2d at 822-23; *Central Educ. Agency v. Burke*, 711 S.W.2d at 8; *American General Fire & Casualty Co. v. Weinberg*, 639 S.W.2d 688; *Cox v. Johnson*, 638 S.W.2d at 868. To avoid overruling these, the majority claims all three recognized that lack of subject matter jurisdiction can initially be raised on appeal. True, but ignored is the conclusion of each that subject matter jurisdiction cannot be waived while standing can be.

Texas has with good reason determined that standing is not excepted from traditional rules of appellate procedure. Our appellate system is predicated on the requirement of presentation of complaints to the lower court coupled with preservation and briefing in the reviewing court. *See* Tex. R. App. P. 52; 74(d), 131(e). Appellate courts face considerable difficulties in deciding an issue not presented to the trial court; ordinarily, the necessary facts will not be fully developed. The unstated effect of today's opinion is to require trial courts to develop facts as to undisputed issues or risk subsequent appellate reversal. This is not an effective use of our limited judicial resources.

The requirement that issues first be presented to the trial court serves another function -- preventing parties from "laying behind the log":

The reason for the requirement that a litigant preserve a trial predicate for complaint on appeal is that one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time.

Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982). While this court has condemned "trial by ambush," *Gutierrez v. Dallas indep. School Dist*, 471 729 S.W.2d 691, 693 *471 (Tex. 1987), today the majority promotes "ambush on appeal."

Three purported policy justifications for the majority's actions are offered, with not a single supporting authority. The first concern is that a strict standing rule is necessary to prevent collusive litigation. Under Texas law, the filing of a fictitious suit constitutes contempt by counsel,

Tex. R. Civ. P. 13, and may serve as the basis for a host of sanctions, including dismissal with prejudice. Tex. R. Civ. P. 215-2b(5). Nor does our Texas judiciary lack the ability to reject collusive litigation. *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 932 ("We believe that our laws and judicial system are adequate to ferret out and prevent collusion. . . ."); *cf. Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985) (refusing to uphold Texas Guest Statute because of danger of collusion). Adhering to precedent today would in no way undermine the power to dismiss fraudulent suits.

The second virtue proclaimed for today's holding is the guarantee that the lower courts will be restrained from exceeding their jurisdictional powers. S.W.2d at . This concern is derived solely from the federal law mandate that a federal appellate court is duty-bound to verify not only its own jurisdiction but that of the lower courts as well. Federal courts, however, have limited jurisdiction; Texas courts do not. Our Texas Constitution creates courts of general jurisdiction, investing them with all of the "judicial power of this State." Tex. Const. art. V, § 1. The differences are evident in our procedural rules. While a federal court must affirmatively ascertain jurisdiction over parties appearing before it, a Texas court's jurisdiction is presumed until proven lacking by a contesting party. *See* Tex. R. Civ. P. 120a.

Lastly, the majority expresses concern as to the res judicata effect on other potential litigants of a judgment rendered in the absence of genuine standing. S.W.2d at . Aware of this concern, the very federal judiciary that this majority is so eager to emulate has failed to perceive it as a problem of significance. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 290, 91 L. Ed. 2d 228, 106 S. Ct. 2523 (1986). If representation is inadequate, or a conflict of interest between members exists, any judgment will have minimal preclusive effect. *Id.* Instead of completely barring access to the courts, procedural safeguards can ameliorate any potentially overbroad effects. *See generally* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, 18 Federal Practice & Procedure § 4456 at 490-94 (1981 & Supp. 1991).

The manufactured nature of the majority's concerns becomes all the more evident when the real world experience of Texas is considered. The majority is unable to point to a single example of collusion during the three decades our Texas rule, which allows the issue of standing to be waived, has been in place. During this period there have likewise been no examples of lower courts making a grab for extrajurisdictional power, nor of oppressed litigants shackled by the res judicata effect of contrived litigation.

In defining state requirements for standing, we are in no way bound by federal jurisprudence founded upon converse jurisdictional principles from our own. Texas courts can afford their citizens access to justice in circumstances where they would have been unable to establish standing in the federal courts. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 113, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983) ("state courts need not impose the same standing . . . requirements that govern federal-court proceedings"); *Doremus v. Board of Education*, 342 U.S. 429, 434, 96 L. Ed. 475, 72 S. Ct. 394 (1952) (state courts not restrained by "case or controversy" limitations of Federal Constitution); *Greer v. Illinois Housing Development Auth.*, 122 Ill.2d 462, 524 N.E.2d 561, 120 Ill. Dec. 531 (1988) ("We are not, of course, required to follow the Federal law on issues of justiciability and standing.").

The differences between our Texas Constitution and the Federal Constitution not only justify, but also require, that citizen groups be accorded a
472 broader right of access *472 to our state courts. The Texas Constitution contains no express limitation of courts' jurisdiction to "cases" or "controversies," as provided by the federal charter.

U.S. Const. art. III, § 2. Instead, it affirmatively protects the rights of litigants to gain access to our judicial system:

All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Tex. Const. art. 1, § 13. As this court has recognized,

The provision's wording and history demonstrate the importance of the right of access to the courts. . . . The right of access to the courts has been at the foundation of the American democratic experiment.

LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986).

This constitutional mandate is reflected in decisions of this court adopting an "open courts" approach to standing in general and associational standing in particular. On several occasions, we have recognized the power of the Legislature to exempt litigants from proof of "special injury." *Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966) (standing may be shown even in the absence of particular damage); *Spence v. Fenchler*, 107 Tex. 443, 180 S.W.597 (1915) (under statute, "any citizen" able to seek injunction, without showing particular interest or personal damage). [79] In enacting the Uniform Declaratory Judgments Act, the Texas Legislature has granted a broad right of standing: any person "whose rights, status or other legal relations *are affected by* a statute" may seek a declaration of those rights. Tex. Civ. Prac. & Rem. Code § 37.004 (emphasis supplied).

[79] Our past acknowledgement of the legislative power to expand access to Texas courts is inconsistent with today's conclusion that we must narrowly limit access. *See* Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Corn. L. Rev. 663 (1977) (because court decisions do not question legislative power to confer standing by statute, they suggest that standing rules are not constitutionally grounded).

This court has previously extended its "open courts" approach to groups representing the interests of their members. [80] In *Texas Highway Comm'n v. Texas Ass'n of Steel Importers*, 372 S.W.2d 525, 530-31 (Tex. 1963), we permitted a business association to challenge an administrative order. Although the order addressed only the import of foreign products for highway construction, this court recognized standing of an organization whose interest in foreign imports was not so limited:

[80] Despite the participation of associational litigants before this court, we have never before questioned standing on our own motion. *See, e.g., Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878 (Tex. 1973).

Some of [the respondents] are owners of imported foreign manufactured products suitable for highway construction purposes. All of them are actively engaged in the sale and use of imported manufactured products. . . .Such parties clearly have the right and litigable interest to have the challenged . . . Order declared null and void.

Id. at 531. Similarly, in *Touchy v. Houston Legal Foundation*, 432 S.W.2d 690 (Tex. 1968), the court considered whether an organization of attorneys had standing to maintain a suit against a charitable corporation to restrain violations of ethical canons governing the practice of law. Based solely on "the special interest attorneys have in their profession," the court held standing was established.

The "open courts" approach [81] of *Touchy* and *Texas Highway Commission* is quite sufficient to
473 allow TAB access to the Texas *473 courts. [82] These two associational standing cases are all but ignored today, brushed aside as setting forth "no particular test." S.W.2d at .

[81]

See Safe Water Foundation of Texas v. City of Houston, 661 S.W.2d 190, 193 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.) (recognizing precedent of this court as according broad right of standing), *app. dism'd*, 469 U.S. 801 (1983); *Texas Industrial Traffic League v. Railroad Comm'n of Texas*, 628 S.W.2d 187 (Tex. App.--Austin) (discussing Supreme Court's expansive approach to standing to allow access to Texas courts), *rev'd*, 633 S.W.2d 821 (Tex. 1982) (per curiam), *overruled by Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, S.W.2d (Tex. 1992).

82 *Accord Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) (recognizing statutorily-granted standing of litigants to seek mandamus to reduce substantial delays in court operations); *Safe Water Foundation of Texas v. City of Houston*, 661 S.W.2d 190 (Tex. App.--Houston [1st Dist.], writ ref'd n.r.e.), *app. dism'd*, 469 U.S. 801 (1983) (drinking water consumer group had standing to contest fluoridation of city water).

Yet in these cases in which the merits of standing are preserved for appellate court review, the Texas test applied has not been complicated. We simply look to whether a party has a stake in the action sufficient to ensure adversarial presentation of the issues and to whether the court's judgment will have any effect on those before it. *See Board of Water Engineers v, City of San Antonio*, 155 Tex. 111, 283 S.W.2d 722, 724 (1955)("there shall be a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought."). Because both of these considerations are met in the instant case, reference to federal law is wholly unnecessary.

Today, however, to justify meddling with Texas standing law, the majority declares that "we foresee difficulties" not here with TAB, but in future cases involving organizational standing. S.W.2d at . To cure these perceived but as yet totally unrealized woes, the majority imposes a difficult to meet, easy to manipulate standard drawn from federal law "that lends itself to our use." *Id.* at . Never needing an invitation to impose more federal requirements on Texas citizens, the majority writes into our Texas law books the confused and troubling federal standing limitations. Not surprisingly, that law has taken a regressive turn, denying standing to public interest associations, including those seeking to protect the environment. *See* Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. Pa. L. Rev. 635, 659 (1985) ("One could perhaps be forgiven for confusing standing's agenda with that of the New Right.").

The benefits of permitting an association to represent the concerns of its members are manifest. As recognized in *United Auto Workers*, 477 U.S. at 290, "The primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." Judicial economy is promoted when one litigant can, in a single lawsuit, adequately represent many members with similar interests, thus avoiding repetitive and costly actions. The wider range of resources often available for associations enhances their effectiveness in litigation:

Special features, advantageous both to the individuals represented and to the judicial system as a whole, . . .distinguish suits by associations on behalf of their members . . . . An association suing can draw upon a pre-existing reservoir of expertise and capital. "Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." . . . These resources assist both courts and plaintiffs.

Id. at 289-90. In some cases, an injury that is substantial as to many may have an individual financial impact too small to make a challenge economically feasible. Associational representation may be the only means of redressing conduct when the harm is limited in

degree but substantial segments of society are affected. Additionally, in challenging policies of government, organizations are generally less susceptible than individuals to retaliation by the bureaucrats they challenge.

These benefits are ignored as the majority declares that henceforth the right of associations to bring suit in Texas courts will be constricted by a three-part federal test set forth in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), requiring that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the
474 organization's *474 purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." [83]

[83] These requirements are allegedly necessary to protect "the members' best interest." S.W.2d at . Perhaps an organization's members are in a better position than this court to determine what is in their best interest.

Yet the *Hunt* test won't hunt in Texas. It is adopted purportedly because of the similarities between the state and federal constitutional underpinnings of the standing doctrine. Two critical factors are ignored: (1) the significant differences between the Texas and United States Constitutions and (2) the fact that much of federal standing doctrine is not mandated by the federal charter, but is imposed solely on the grounds of judicial "prudence." *Warth v. Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1974) ("This [standing] inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.").

The majority works a grave disservice to our Texas Constitution by equating our open courts provision, affirmatively guaranteeing all Texans access to our judicial system, with an express federal constitutional limitation on the right to seek redress in court. Despite the fact that the two provisions are vastly different in language, history and purpose, the majority nonetheless determines to "look to the more extensive jurisprudential experience of the federal courts" to determine standing. This is clearly an erroneous course. *See Davenport v. Garcia*, 834 S.W.2d 4, (Tex. 1992, orig. proceeding) (in blindly adhering to federal law, "based on different language, different history and different cases, "from our treasured state heritage, law and institutions . . . [we] derive nothing. . . .").

Even the federal constitutional constraint is a simple one, looking to whether "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 498, *quoting Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). In fact, this bare-bones test closely resembles the approach that Texas courts have long chosen to follow. To the extent *Hunt* constructs additional barriers to access to our judicial system, they are wholly court-created. [84] No justification for their adoption is contained in the majority opinion.

[84] Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3531.3, at 418 ("The problems [of standing] are difficult enough without the compounding effect of constitutional attribution.").

Moreover, in turning to the federal law of standing, the majority invokes a doctrine that has been criticized more heavily and justifiably than perhaps any other. *See, e.g.*, Gene R. Nichol, Jr., *Rethinking Standing*, 72 Cal. L. Rev. 68, 68 (1984); Mark V. Tushnet, *The "Case or Controversy" Controversy*, 93 Harv. L. Rev. 1698, 1713-21 (1980). Even the United States Supreme Court has recognized that federal standing requirements have an "iceberg quality," *Flast v. Cohen*, 392 U.S. 83, 94, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968); yet the majority fails to navigate

a course, not unlike the captain of the Titanic, that would steer Texas well away from this potential disaster.

The concept of standing is "employed to refuse to decide the merits of a legal claim." Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3531, at 338. Critics of the doctrine's complexity and uncertainty have recognized how subject it is to manipulation: "standing . . . is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits." *Id.* at 348 (citing commentaries). [85] Important rights
475 can be left unprotected *475 as a result. *Id.* at § 3531.3, 416-17 ("Standing decisions present courts with an opportunity to avoid the vindication of unpopular rights, or even worse to disguise a decision on the merits in . . . opaque standing terminology . . . . Unarticulated and arbitrary predilection, cast as standing, defeats rights that deserve judicial protection.").

85 *See also, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 490, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) (Brennan, J., dissenting); Abram Chayes, *The Supreme Court, 1981 Term -- Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 23 (1982) (Having ritually recited the standing formula, "the Court then chooses up sides and decides the case."); Michael A. Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 St. L. U. L.J. 663, 678 (standing barrier "raised or lowered based on the degree of hostility to, or favoritism for, consideration of the issues on their merits"); Albert Broderick, *The* Warth *Optional Standing Doctrine: Return to Judicial Supremacy?* 25 Cath. U. L. Rev. 467, 504, 516-17 (1976).

Even during the three years that this particular cause has been pending here, the federal courts have been hard at work to manipulate standing requirements to bar public interest groups from seeking judicial vindication of rights common to their members. In *Lujan v. National Wildlife Federation*, ___ U.S. ___, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), a nationally-recognized environmental group challenged a new development classification for certain federal wilderness areas that allegedly violated several federal statutes. The suit was dismissed for lack of standing based upon a rigid construction of the requirement of injury to the association's members. This decision has been widely criticized as significantly impairing the ability of public interest groups to represent their members, particularly those that seek to protect this nation's environment and natural resources. [86] Today the majority eagerly positions itself to give the same treatment to those Texans who would petition our state courts to protect the public interest. The majority not only conspicuously relies on *Lujan*, S.W.2d at, but also embraces the extremist anti-environmental stance propounded in an article openly critical of judicial opinions permitting citizens to complain of harm inflicted upon our natural resources. *Id.* at, citing Atonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983).

86 *See* Katherine B. Steuer and Robin L. Juni, *Court Access for Environmental Plaintiffs: Standing Doctrine in* Lujan v. National Wildlife Federation, 15 Harv. Envtl. L. Rev. 187, 232-33 (1991); Sarah A. Robichaud, Note, Lujan v. National Wildlife Federation: *The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 Cath. U. L. Rev. 443, 470-74 (1991); V. Maria Cristiano, Note, *In Determining an Environmental Organization's Standing to Challenge Government Actions Under the Land Withdrawal Review Program, the Use of Lands in the Vicinity of Lands Adversely Affected by the Order of the Bureau of Land Management Does Not Constitute Direct Injury*--Lujan v. National Wildlife Federation, 2 Seton Hall Const. L.J. 445

(1991); Michael J. Shinn, Note, *Misusing Procedural Devices to Dismiss an Environmental Lawsuit*, 66 Wash. L. Rev. 893, 904-12 (1991); Lynn Robinson O'Donnell, Note, *New Restrictions in Environmental Litigation: Standing and Final Agency Action After* Lujan v. National Wildlife Federation, 2 Vill. Envtl. L.J. 227, 251 (1991); Bill J. Hays, Comment, *Standing and Environmental Law: Judicial Policy and the Impact of* Lujan v. National Wildlife Federation, 39 Kan. L. Rev. 997, 1042-43 (1991).

Rather than a careful consideration of our Texas precedent and our unique Texas Constitution, today Texans are handed yet another unthinking embrace of federal law. Claiming "guidance" from federal precedent, S.W.2d at, the majority overrules all Texas cases treating standing as a procedural issue, then unnecessarily modifies all Texas precedent addressing the merits of standing. Without explanation, today's opinion simply photocopies into our Texas law books the federal law of standing with all of its much-criticized complexities. Once again the majority chooses more Washington wisdom for Texas when what we need is more Texas thinking in Washington. *See Bexar County Sheriff's Civ. Service Comm'n v. Davis*, 802 S.W.2d 659, 665 (Tex. 1990) (Doggett, J., dissenting).

While today the corporate members of the Texas Association of Business are permitted to challenge the bureaucracy, tomorrow this same reasoning will be employed to bar public interest, neighborhood, environmental and consumer groups from vindicating the rights of their members. Today's opinion not only repudiates our past "open courts" approach to access to the judicial system but also eliminates the long-
476 recognized appellate requirement that *476 error be preserved. The majority has charged well beyond traditional constraints in its writing.

To the extent this case is about standing, it is about standing still, about closing the courthouse door, once standing open. For today the majority extends a standing invitation to those who would harm our environment to act without fear of citizen challenge in the Texas courts.

IV. Conclusion

Today the environment is the immediate victim. Those who pollute our rivers, release toxins into our air, and damage our land cannot be promptly penalized. Instead, only after the very slow wheels of our judicial system have creaked to a stop will violators of environmental protection laws be held accountable.

Yet the environment is not the whole story. Much as a river may seem pure and clear even at the place where illegal sewage is being pumped into it, the danger from a court's opinion may not be immediately apparent on its surface. Only after the reasoning is applied in other cases is the severity of the resulting harm to our system of justice revealed. Today's impairment of the ability of concerned citizens to vindicate the rights of many in our courts and the majority's knockout punch to the right of trial by jury will unfold in future cases to bar participation of ordinary citizens in Texas courts.

The mess in Texas is not only with our environment but with the misinterpretation of the law.

Lloyd Doggett

Justice

Opinion Delivered: March 3, 1993

CONCURRING AND DISSENTING OPINION

Rose Spector

I agree with the substance of the concurring and dissenting opinion by Justice Doggett. I write separately, however, to explain why I would uphold the statutory requirement that those who

run afoul of environmental laws make timely payment of administrative penalties before seeking judicial review.

In two other causes decided today, this court has considered open courts challenges to the statutory requirement that state mineral lessees prepay administrative deficiency assessments before seeking judicial review of those assessments. *State v. Flag-Redfern Oil Co.* and *State v. Rutherford Oil Corp.*, ___ S.W.2d ___ (Tex. 1993) (considering Tex. Nat. Res. Code § 52.137). Our
480 analysis in those cases focused on the *480 public interest at stake: the State's only interest in the prepayment requirement, we noted, was its financial interest in immediate access to disputed royalty payments. *Id.* at ___. Thus, we concluded that the prepayment requirement of section 52.137 was no different, in constitutional terms, from the litigation tax disapproved in *LeCroy v. Hanlon*, 71 S.W.2d 335, 342 (Tex. 1986). *Id.*

The present case, in contrast, does not involve a litigation tax. The Clean Air Act, the Solid Waste Disposal Act, and the Water Quality Act embody this state's commitment to protect the environment; and the prepayment requirements struck down today were intended to give force to that commitment, not to raise revenue. Without the need to prepay administrative penalties, polluters will be left with little if any incentive to timely comply with environmental laws and regulations.

The effects of today's decision, though, extend far beyond the statutes at issue in this case. By rejecting these prepayment requirements, without regard to the state interest involved, the majority has struck a severe blow to this state's ability to enforce a broad range of regulations in the public interest. The similar statutory provisions identified in the opinion by Justice Doggett, ___ S.W.2d at ___, cannot be dismissed as minor technicalities; they are carefully-crafted measures that the legislature considered vital to protect the public from recalcitrant lawbreakers. Casting those provisions aside will seriously disrupt the effective operation of our state government.

The Texas Constitution cannot be construed in absolutes. The basic right of access to the courts must be balanced against the need to protect the public's health and safety. While the restriction at issue in this case may be substantial, I would hold that the public's interest in clean air and water, combined with the due process afforded to TAB's members in the administrative process, tips the balance in favor of the prepayment requirement. I therefore dissent.

Rose Spector

Justice

OPINION DELIVERED: March 3, 1993

No. 07-0945
Supreme Court of Texas

Texas Parks v. Sawyer Trust

354 S.W.3d 384 (Tex. 2011) · 54 Tex. Sup. Ct. J. 1621
Decided Aug 26, 2011

No. 07–0945.

2011-08-26

TEXAS PARKS AND WILDLIFE DEPARTMENT, Petitioner, v. The SAWYER TRUST, Respondent.

Greg W. Abbott, Attorney General of Texas, Kent C. Sullivan, 14th Court of Appeals, Jeffrey L. Rose, Attorney General of Texas, Karen Watson Kornell, Office of the Attorney General of Texas, Liz Bills, David Preister, Office of the Attorney General, Kristofer S. Monson, Assistant Solicitor General, Austin, TX, for Texas Parks and Wildlife Department. Jody G. Sheets, Law Office of Jody Sheets, Dallas, TX, for The Sawyer Trust.

386 *386 Greg W. Abbott, Attorney General of Texas, Kent C. Sullivan, 14th Court of Appeals, Jeffrey L. Rose, Attorney General of Texas, Karen Watson Kornell, Office of the Attorney General of Texas, Liz Bills, David Preister, Office of the Attorney General, Kristofer S. Monson, Assistant Solicitor General, Austin, TX, for Texas Parks and Wildlife Department. Jody G. Sheets, Law Office of Jody Sheets, Dallas, TX, for The Sawyer Trust. William F. Warnick, Texas General Land Office, Austin, TX, for Amicus Curiae Texas General Land Office.**Justice JOHNSON delivered the opinion of the Court, in which Chief Justice JEFFERSON, Justice WAINWRIGHT, Justice MEDINA, Justice GREEN, Justice WILLETT, Justice GUZMAN, and Justice LEHRMANN joined.**

This appeal involves the issue of whether the trial court had jurisdiction over a claim against the Texas Parks and Wildlife Department to determine whether the Salt Fork of the Red River is navigable. The Sawyer Trust sued the Department for a declaratory judgment that the river is not navigable and that the Trust owns the riverbed where it crosses the Trust's property in Donley County. The Department filed a plea to the jurisdiction based on sovereign immunity. After the Department took the position that the river was navigable—and the State therefore owned the riverbed—the Trust added a constitutional takings claim. The trial court denied the Department's plea and the court of appeals affirmed.

We hold that the Trust's claims for a declaratory judgment are barred by sovereign immunity and the Trust cannot assert a takings claim under these circumstances. We also hold, however, that the Trust is entitled to replead and attempt to assert an ultra vires claim against state officials if it chooses to do so. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

I. Background

The State of Texas owns the soil underlying navigable streams.

1 1 1 Tex. Parks & Wild.Code § 1.011(c); Tex. Water Code § 11.021; *see Maufrais v. State,* 142 387 Tex. 559, 180 S.W.2d 144, 148 (1944); *387 *State v. Bradford,* 121 Tex. 515, 50 S.W.2d 1065, 1069 (1932). By statute, a "navigable stream" is "a stream which retains an average width of 30 feet

from the mouth up." Tex. Nat. Res.Code § 21.001(3). The taking of sand and gravel from state-owned waters and beds, including those of navigable streams, is regulated by the Department. Tex. Parks & Wild.Code § 1.011(d); Tex. Nat. Res.Code § 51.291; 31 Tex. Admin. Code § 69.101.

[1] Subject to specified limitations, title to certain streambeds has been transferred by the State. *See* Tex.Rev.Civ. Stat. art. 5414a–1. The State and the Trust contend their respective rights to the sand and gravel in the bed of the Salt Fork turn on the issue of navigability. We assume, without deciding, that their positions are correct.

[1] 162 Tex. 549, 349 S.W.2d 579, 582 (1961).

[1] 162 Tex. 549, 349 S.W.2d 579, 582–583 (1961).

2. *State v. Riemer,* 94 S.W.3d 103, 110 (Tex.App.-Amarillo 2002, no pet.); *see also Cornelius v. Armstrong,* 695 S.W.2d 48, 49 (Tex.App.-Tyler 1985, writ ref'd n.r.e.).

3. *Fleming v. Patterson,* 310 S.W.3d 65, 70 (Tex.App.-Corpus Christi–Edinburg 2010, no pet.); *State v. BP Am. Prod. Co.,* 290 S.W.3d 345, 356–357 (Tex.App.-Austin 2009, pet. denied); *Porretto v. Patterson,* 251 S.W.3d 701, 711 (Tex.App.-Hous. [1st Dist.] 2007, no pet.); *Texas Parks and Wildlife Dep't v. Callaway,* 971 S.W.2d 145, 152 (Tex.App.-Austin 1998, no pet.); *Bell v. State Dep't of Highways and Pub. Transp.,* 945 S.W.2d 292, 295 n. 1 (Tex.App.-Hous. [1st Dist.] 1997, pet. denied).

The Salt Fork of the Red River crosses property in Donley County owned by the Sawyer Trust. The Trust had an opportunity to sell sand and gravel from the streambed but was concerned that the Department would seek control of the property and interfere with the sale. *See* Tex. Parks & Wild.Code § 86.002(a); 31 Tex. Admin. Code §§ 69.104, 69.114(a). The Trust sued the Department

[2] [2] for a declaratory judgment that the Salt Fork was not navigable.

[2] The Trust also sued, but then non-suited, the Texas Commission on Environmental Quality.

[2] 121 Tex. 515, 50 S.W.2d 1065, 1069 (1932).

3. *See also, e.g.,* 17 William V. Dorsaneo, III, et al., Texas Litigation Guide § 251.04[4][b] (2011) ("A plaintiff ... may effectively evade sovereign immunity concerns by bringing a trespass to try title action against an appropriate government officer in an official capacity, because legislative consent to suit against an officer is not required in the specific context of a trespass to try title action.") (citing *Lain,* 349 S.W.2d at 581).

4. *Cf. Oklahoma v. Texas,* 258 U.S. 574, 585, 42 S.Ct. 406, 66 L.Ed. 771 (1922) (noting that government surveyors' determination created a "legal inference of navigability" that had little significance because "those officers were not clothed with power to settle questions of navigability"); *Barden v. N. Pac. R.R. Co.,* 154 U.S. 288, 320–21, 14 S.Ct. 1030, 38 L.Ed. 992 (1894) (observing that government surveyor's determination was entitled to "[s]ome weight" but was not conclusive because he was not "authorized to determine finally the character of any lands granted or make any binding report thereon").

[3] The Department filed a plea to the jurisdiction. It asserted that (1) the Trust had not pled a claim that fell within a waiver of sovereign immunity, and (2) the Trust's claims were not ripe because the Department had neither taken action contrary to the Trust's interests nor manifested any intent to do so.

3 The Trust also sued for injunctive relief. The parties do not address that claim and neither do we.

Pursuant to agreement of the parties, and at the urging of the trial court, a surveyor from the General Land Office visited the streambed on the Trust property. He then filed a letter with the trial court setting out that his visit was "for the purpose of determining if the stream was statutorily navigable." He concluded that the Salt Fork was navigable at the point where he measured it on the Trust's property. The Trust then amended its pleadings and added an allegation that the State's claim of navigability constituted a taking of its property under the federal and Texas Constitutions. The trial court denied the Department's plea to the jurisdiction.

The court of appeals affirmed. It held that a declaratory judgment action seeking the determination of a disputed fact issue—the navigability of the stream—is not a suit against the State that implicates sovereign immunity. 354 S.W.3d 489. The court of appeals concluded that although the declaratory action "may have the collateral consequence of resolving a factual dispute that impacts a claim being made by the State, it is not an action that is in essence one for the recovery of money from the State or for determination of title; therefore, legislative permission to prosecute is unnecessary." *Id.* at 490.

The Department no longer urges its ripeness challenge to the Trust's claim: it maintains that the Salt Fork is navigable. Nevertheless, the Department asserts that sovereign immunity deprived the trial court of jurisdiction because (1) there is no general right to sue a State entity for a declaration of rights—such relief is available only in an ultra vires claim against a state official; (2) determination of whether a stream is navigable constitutes a determination of the State's title to property and sovereign immunity bars a suit that would have such an effect; and (3) the Trust's pleadings fail to state a constitutional takings claim. The Trust counters that the trial court had jurisdiction because the suit is (1) a permissible declaratory judgment action under the Texas Constitution; (2) an authorized declaratory judgment action to determine a boundary line as opposed to a trespass to try title suit to determine ownership rights; and (3) a constitutional takings
388 claim because *388 the State has destroyed value and use of the Trust's property. Alternatively, the Trust argues that if this suit involves an ultra vires claim that it should have brought against a governmental actor, we should remand the case with instructions to modify the parties.

II. Discussion

A. Standard of Review

Whether a trial court has jurisdiction is a question of law subject to de novo review. *See Tex. Natural Res. Conservation Comm'n v. IT–Davy,* 74 S.W.3d 849, 855 (Tex.2002).

Generally, sovereign immunity deprives a trial court of jurisdiction over a lawsuit in which a party has sued the State or a state agency unless the Legislature has consented to suit. *See, e.g., Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 224 (Tex.2004). But when the State or a state agency has taken a person's property for public use, the State's consent to suit is not required; the Constitution grants the person consent to a suit for compensation. *See, e.g., State v. Holland,* 221 S.W.3d 639, 643 (Tex.2007); *Steele v. City of Houston,* 603 S.W.2d 786, 791 (Tex.1980).

B. Declaratory Relief

The Declaratory Judgments Act (DJA) generally permits a person who is interested in a deed, or whose rights, status, or other legal relations are affected by a statute, to obtain a declaration of rights, status, or other legal relations thereunder. Tex. Civ. Prac. & Rem.Code § 37.004(a). The Department urges, however, that there is no general right to sue a state agency for a declaration of rights. We agree.

1. Actions Against State Entities

While the DJA waives sovereign immunity for certain claims, it is not a general waiver of sovereign immunity. *See id.* § 37.006(b); *City of El Paso v. Heinrich,* 284 S.W.3d 366, 373 n. 6 (Tex.2009) (noting that the DJA waives immunity for claims challenging the validity of ordinances or statutes); *IT–Davy,* 74 S.W.3d at 855–56. But generally, the DJA does not alter a trial court's jurisdiction. *IT–Davy,* 74 S.W.3d at 855. Rather, the DJA is "merely a procedural device for deciding cases already within a court's jurisdiction." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 444 (Tex.1993). And a litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit. *Heinrich,* 284 S.W.3d at 370–71; *IT–Davy,* 74 S.W.3d at 855. Consequently, sovereign immunity will bar an otherwise proper DJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity. *See City of Houston v. Williams,* 216 S.W.3d 827, 828–29 (Tex.2007) (per curiam).

The Trust argues that sovereign immunity does not apply because the Department acted outside its legal authority when it asserted the Salt Fork was navigable and the State owned the streambed. We disagree—the Department is immune from suit.

The rule remains as it was set out in *State v. Lain:*

> When in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign immunity should be sustained.... 162 Tex. 549, 349 S.W.2d 579, 582 (1961). Neither *Heinrich* nor the DJA creates an
> 389 exception to a state agency's immunity in *389 suits for title to land. *See Heinrich,* 284 S.W.3d at 370–73. If the Trust's suit against the Department is in substance a trespass to try title action, it is barred by sovereign immunity absent the Legislature's having waived its immunity. *See Lain,* 349 S.W.2d at 582.

2. Contesting Title with the State

Generally, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property. *See* Tex. Prop.Code § 22.001(a) ("A trespass to try title action is the method of determining title to lands, tenements, or other real property."); *Martin v. Amerman,* 133 S.W.3d 262, 267 (Tex.2004). "Real property" generally includes the sand and gravel on a tract of land, *see, e.g., Moser v. U.S. Steel Corp.,* 676 S.W.2d 99, 102 (Tex.1984), and in this case the Department does not claim otherwise.

In 2007, the Texas Legislature added an exception to the rule that a trespass to try title claim is the exclusive method for adjudicating disputed claims of title to real property. Section 37.004(c) of the Texas Civil Practice and Remedies Code provides that, notwithstanding the trespass to try title statute, a person interested under a deed, will, written contract, or other writings constituting a contract may obtain a determination of title based on a property boundary line "when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties." Tex. Civ. Prac. & Rem.Code § 37.004(c); *see* Tex. Prop.Code § 22.001(a). The Trust argues that the claims in this case constitute a boundary dispute and that "new section 37.004(c) can easily and logically be construed as a legislative waiver of any sovereign immunity that has ever in the past impeded private titleholders' efforts to litigate their boundary disputes against the State." We disagree that the claims here constitute a boundary dispute.

The central test for determining jurisdiction is whether the "real substance" of the plaintiff's claims falls within the scope of a waiver of immunity from suit. *See, e.g., Dallas County Mental Health & Retardation v. Bossley,* 968 S.W.2d 339, 343–44 (Tex.1998). The real substance of the Trust's pleadings, evidence, and arguments is that the Salt Fork is not navigable and the State has no ownership rights in its bed. Its

allegations are summarized in its live pleading in the section entitled "Causes of Action Against Defendants":

Defendants' claim of ownership and attempts to enter the property to limit or control Landowner's activities, and that of third parties, *by asserting rights of ownership and the right to control, regulate or prohibit the removal of sand and gravel* constitute an improper claim to and use of the property by Defendants and unreasonably interfere with the Landowner's rights to use and enjoy its property. (emphasis added) Under the "Relief Sought" section of its pleadings, the Trust sought a declaratory judgment that no navigable stream is present on its property, despite the Department's contention to the contrary, and injunctive relief precluding the Department from entering the Trust's property in an attempt to limit, control, or interfere with the removal of sand and gravel from the Trust's property.

We need not decide whether section 37.004(c) effects a waiver of the State's immunity from suit for boundary disputes because this controversy is not over the boundary between State-owned land and Trust-owned land; rather it is over whether the State owns any land at all. The case involves rival claims to ownership of the entire streambed. Consequently, the Trust's suit in substance is one
390 to determine*390 title to land. Such a suit against the State is barred by sovereign immunity absent legislative consent. *See Dallas Area Rapid Transit v. Whitley,* 104 S.W.3d 540, 542 (Tex.2003); *Lain,* 349 S.W.2d at 582.

The Trust also urges that it may maintain its suit against the Department because whether a stream is navigable is a judicial determination. It cites to *State v. Bradford,* in which this Court stated,

The public policy of this state with respect to navigable streams long has been established and enforced, and it is not a question left to the discretion and judgment of ministerial officers. Under the law, those officers were and are not clothed with the power to settle questions of navigability of streams, but, in view of the very nature and importance of the matter, for obvious reasons, it is a question for judicial determination. 121 Tex. 515, 50 S.W.2d 1065, 1070 (1932) (citations omitted). We agree with the Trust that the issue is one for judicial determination. But as we discuss later in greater detail, such a claim is an ultra vires one that must be brought against a governmental official and not the State.

Here the Department, as a defendant, has asserted its sovereign immunity and the Trust has not shown any exceptions to or waiver of it. While courts may determine questions of navigability when they have jurisdiction, a navigability dispute does not comprise an exception to or waiver of sovereign immunity and vest jurisdiction in the courts when the State or a state agency is sued.

In sum, notwithstanding the manner in which they are pleaded, the Trust's claims for declaratory relief are claims against the Department to determine title to the bed of the Salt Fork and are barred by sovereign immunity. *See Lain,* 349 S.W.2d at 582.

C. Takings Claim

1. Analysis

The Trust also asserts that a waiver of immunity is not required because this is a suit based on a constitutional taking. The Trust argues that a taking has occurred because the Department's claim of ownership unreasonably interferes with the Trust's rights to use and enjoy its property. The Department urges that the Trust's claim is not a valid takings claim because the Trust seeks only declaratory and injunctive relief based on the dispute over title to the bed of the Salt Fork—a dispute that will be determined by whether the Salt Fork is navigable—but which is nothing more than a title dispute nonetheless.

We agree with the Department. Although the Trust referenced the United States and Texas Constitutions, it did not assert a valid takings

claim giving the trial court jurisdiction over its claim.

The Texas Constitution provides that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Tex. Const. art. I, § 17. Likewise, the United States Constitution provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Sovereign immunity does not shield the State from claims based on unconstitutional takings of property. *See, e.g., Holland,* 221 S.W.3d at 643; *Steele,* 603 S.W.2d at 791. Whether the government's actions are sufficient to constitute a taking is a question of law. *E.g., Gen. Servs. Comm'n v. Little–Tex Insulation Co.,* 39 S.W.3d 591, 598 (Tex.2001).

To establish a takings claim, the claimant must
391 seek compensation because *391 the defendant intentionally performed actions that resulted in taking, damaging, or destroying property for public use without the owner's consent. *See id.* Whether a taking has occurred depends largely on definitional and conceptual issues. *See* 2A Julius L. Sackman, Nichols on Eminent Domain § 6.01[1] (3d ed.2006).

The premise for a constitutional takings cause of action is that one person should not have to absorb the cost of his property being put to a public use unless he consents. *See Steele,* 603 S.W.2d at 789. In contrast to a trespass to try title claim, which quiets title and the right of possession to property, a successful takings claim entitles a claimant to compensation, not to possession of the property. *See* Tex. Const. art. I, § 17 ("No person's property shall be taken ... *without adequate compensation* being made ....") (emphasis added); *City of Beaumont v. Bouillion,* 896 S.W.2d 143, 149 (Tex.1995) (stating that section 17 of the Texas Constitution waives immunity only when a claimant is seeking compensation); *cf. Martin,* 133 S.W.3d at 264–65 ("[a] trespass to try title action is the method of determining title to lands, tenements, or other real property." (quoting Tex. Prop.Code § 22.001)).

In this case, the Trust asserted in its amended pleadings that through the Department's contention that a navigable stream exists on the Trust's property, the Department wrongfully claimed title to part of the Trust's property. The only relief sought by the Trust was declaratory and injunctive relief to effectively determine its ownership of and right to possess the bed of the Salt Fork. The Trust did not seek compensation—the only relief available in a takings claim—nor did it seek a declaration that the Department had taken Trust property for public use. *See Bouillion,* 896 S.W.2d at 149. The difference between a takings claim and a trespass to try title claim was clearly articulated by the court of appeals in *Porretto v. Patterson:*

In a trespass to try title or to quiet title action, an owner sues to recover immediate possession of land unlawfully withheld. A prevailing party's remedy is title to, and possession of, the real property interest at issue in the suit.

On the other hand, a takings claim is one in which a landowner alleges that the government has taken his property for public use without permission, for which he seeks compensation. The available remedy is a key distinction between the two. While one suit quiets title and possession of the property, the other allows only for just compensation for the property taken or used—the prevailing party does not regain use of land lost to the public's use, or win possession of it. 251 S.W.3d 701, 708 (Tex.App.-Houston [1st Dist.] 2007, no pet.) (citations omitted).

Here, the Department has merely identified the streambed as belonging to the State because the State asserts the Salt Fork is navigable. *See* Tex. Nat. Res.Code § 21.001(3); Tex. Parks & Wild.Code § 1.011(c); Tex. Water Code § 11.021; *Bradford,* 50 S.W.2d at 1068–69. The Trust stated in its amended pleadings that the State

"wrongfully claim[ed] title" to the streambed, resting its assertion on the Department's contention that a navigable stream exists on the property. It is undisputed that the Department has not taken action to apply materials in the streambed to public use by actions such as selling them. *Cf. Porretto,* 251 S.W.3d 701 (takings claim was based on the State's leasing of property); *State v. BP Am. Prod.,* 290 S.W.3d 345 (Tex.App.-Austin 2009, pet. denied) (takings claim was based on the State's grant of an oil and gas lease); 392 and *392 *Koch v. Gen. Land Office,* 273 S.W.3d 451 (Tex.App.-Austin 2008, pet. denied) (takings claim was based on the General Land Office's removal and sale of limestone). It has not done anything that would require it to compensate the Trust if the streambed is not navigable. Thus, the Trust cannot colorably claim that it seeks compensation by means of a suit in the nature of an inverse condemnation cause of action.

In a case such as the one before us, where the question of who owns the property is the only issue and title and possession are the only available remedies, the record and the briefs show conclusively that the Trust does not have a constitutional takings claim for compensation. *See Tex. A & M Univ. Sys. v. Koseoglu,* 233 S.W.3d 835, 840 (Tex.2007) (holding that a remand to permit a claimant to replead would serve no legitimate purpose when the underlying claim was a breach of contract claim and immunity could not be overcome). If the Trust owns the property, it is not entitled to compensation for a taking. And if the State owns the property, the Trust is not entitled to compensation because nothing was taken from it. The Trust confirms the foregoing conclusions when it says in this Court that it "does not seek money damages" and "does not seek to establish liability."

[4] [4] While the Trust has requested that if the State is granted relief in any respect, the Trust be permitted to modify the parties to assert an ultra vires claim against state officials, it makes no similar request to replead to assert a claim for compensation. The reason why is clear, as we have set out above.

4 The Trust also does not seek consequential damages. *See Omnia Comm. Co. v. U.S.,* 261 U.S. 502, 510, 43 S.Ct. 437, 67 L.Ed. 773 (1923) (stating that "for consequential loss or injury resulting from lawful government action the law affords no remedy").

4 284 S.W.3d 366 (Tex.2009).

5. *Id.* at 370–372.

6. *Id.* at 372.

Generally, a party is not entitled to relief it does not request. *State v. Brown,* 262 S.W.3d 365, 370 (Tex.2008). And just as the Trust's suit is not one to determine the boundary between land owned by the State and land owned by the Trust, it is not a takings claim. Allowing the Trust's claim of title to be adjudicated by means of a takings claim would allow claimants to circumvent the State's sovereign immunity by creatively pleading such claims. Creative pleading cannot be used to effect the loss or waiver of the State's sovereign immunity. *See IT–Davy,* 74 S.W.3d at 856.

2. Response to the Dissent

The dissent would allow the Trust to pursue a takings claim even though the Trust has no claim for compensation. It would do so because,

[b]y imposing statutory damages and civil and criminal penalties for mining a streambed without a permit, the State has all but prohibited a claimant from acting on a right asserted in good faith and risking the consequences in an action brought by the State. Legislative consent to sue for title is thus made virtually absolute. 354 S.W.3d at 406 (Hecht, J., dissenting). But even recognizing the practical effects of statutory damages and civil and criminal penalties for taking state-owned property still does not mean that the government has taken property belonging to the Trust. Under the

circumstances, we fail to see how the Trust's claim is or can be for compensation, which is the only constitutional remedy for a takings claim.

Further, it seems that the dissent has mingled takings claims and ordinary claims for which legislative consent is required by its statement that "[l]egislative consent to sue for title is thus made virtually absolute." Legislative consent is not *393 required for a constitutional takings claim to be brought. And as to a statutory waiver of immunity, the Legislature has specified that it does not intend a statute to waive sovereign immunity "unless the waiver is effected by clear and unambiguous language." Tex. Gov't Code § 311.034. Whether Legislative consent to sue for title can be found in the statutory construct that protects materials in navigable streambeds by providing penalties for selling them without the State's permission is relevant to the Trust's title determination claim for which legislative consent is required; it is not relevant as to a takings claim for which the Constitution provides consent. Finally, construing the imposition of statutory damages and civil and criminal penalties for taking public property as effecting a constitutional taking creates a structure in which title to public property is placed at risk of transfer to private persons by default. And the dissent's proposed construct would not necessarily be limited to determining who owned the bed of a stream. It might well apply to any title dispute involving the State. Such a situation would significantly affect the Legislature's power to manage the limited resources of the State in regard to litigating title claims. We do not believe such a departure from the existing framework of statutory law and our precedent is warranted.

D. Ultra Vires Claim

The Trust asserts that if the Court determines the suit cannot proceed against the Department, the Court should remand the case to permit it to add state actors as parties and pursue an ultra vires claim. The Department urges that the suit should be dismissed because there is no basis for arguing that a department official has acted ultra vires.

A suit against a state official for acting outside his authority is not barred by sovereign immunity. *See Heinrich,* 284 S.W.3d at 370–74. While suits to try the State's title are barred by immunity, in some instances a party may maintain a trespass to try title action against governmental officials acting in their official capacities. *See Lain,* 349 S.W.2d at 581. In *Heinrich,* the Court affirmed the rule that suits for declaratory or injunctive relief against a state official to compel compliance with statutory or constitutional provisions are not suits against the State. *See Heinrich,* 284 S.W.3d at 370–74. If a government official acting in his official capacity possesses property without authority, then possession is not legally that of the sovereign. Under such circumstances, a defendant official's claim that title or possession is on behalf of the State will not bar the suit. *See Lain,* 349 S.W.2d at 581–83. A suit to recover possession of property unlawfully claimed by a state official is essentially a suit to compel a state official to act within the officer's statutory or constitutional authority, and the remedy of compelling return of land illegally held is prospective in nature.

The State urges that evidence before the trial court showed a state surveyor had examined the river and determined it to be navigable and that "[g]iven the Department's express statutory authority to exercise the State's right of ownership over this sand and gravel, there is simply no basis for arguing that a department official has acted *ultra vires.*" We disagree.

The Trust and the dissent point out that the Department is in a unique position. It has sovereign immunity from the Trust's suit to determine title to the streambed. Though the Trust strongly disagrees with the Department's claim of navigability, the Trust seemingly has little recourse if the Department's position that the stream is *394 navigable cannot be challenged by an ultra vires suit. The Department suggests that the Trust could take materials from the streambed and if the State sought civil damages filed or criminal charges, then the State would have to

prove it owned the materials in the streambed by proving the Salt Fork is navigable. A landowner should not be put in such an untenable position if it can be avoided. And while we disagree that the facts before us constitute a constitutional taking, we conclude that they constitute "possession" of the streambed by the State for purposes of *Lain.*

In *Lain,* we set out the manner in which trespass to try title claims against government officials should proceed and the manner of relief that should be granted when the officials file pleas to the jurisdiction:

[W]hen officials of the state are the only defendants, or the only remaining defendants, and they file a plea to the jurisdiction based on sovereign immunity, it is the duty of the court to hear evidence on the issue of title and right of possession and to delay action on the plea until the evidence is in. If the plaintiff fails to establish his title and right of possession, a take nothing judgment should be entered against him as in other trespass to try title cases. If the evidence establishes superior title and right of possession in the sovereign, the officials are rightfully in possession of the sovereign's land as agents of the sovereign and their plea to the jurisdiction based on sovereign immunity should be sustained. If, on the other hand, the evidence establishes superior title and right of possession in the plaintiff, possession by officials of the sovereign is wrongful and the plaintiff is entitled to relief. In that event the plea to the jurisdiction based on sovereign immunity should be overruled and appropriate relief should be awarded against those in possession. *Lain,* 349 S.W.2d at 582.

The Department has the authority to make determinations on behalf of the State as to navigability of streams and to exercise the State's rights over navigable streambeds. Nevertheless, its pronouncement that a stream is navigable is not conclusive of the question. This Court established long ago that the question of navigability is, at bottom, a judicial one. *Bradford,* 50 S.W.2d at 1070.

Here it is undisputed that the part of the streambed in question and claimed by the State to be navigable lies on land owned by the Trust. If the Salt Fork is not navigable, the Trust owns the bed. We see no good reason that the process and principles we set out long ago in *Lain* should not apply. The Trust should be given an opportunity to amend and cure the pleading and party defects, if it chooses to do so, and have the suit proceed against the governmental actors laying claim to the streambed. *See Koseoglu,* 233 S.W.3d at 840; *Lain,* 349 S.W.2d at 582.

III. Conclusion

We reverse the judgment of the court of appeals. The case is remanded to the trial court for further proceedings in accordance with this opinion.

Chief Justice JEFFERSON filed a concurring opinion, in which Justice MEDINA, Justice WILLETT, and Justice GUZMAN joined.

Justice HECHT filed an opinion concurring in part and dissenting in part.

Chief Justice JEFFERSON, joined by Justice MEDINA, Justice WILLETT, and Justice GUZMAN, concurring.

I join the Court's opinion but offer a few
395 additional observations about the dissent. *395
According to the dissent, our decision today is groundbreaking because it waives immunity for trespass to try title suits. But at least since *State v. Lain,*

[1] and probably since *State v. Bradford,*

[2] that has been the law in Texas. *See, e.g., Coastal Indus. Water Auth. v. York,* 532 S.W.2d 949, 954 (Tex.1976) (holding, in declaratory judgment action brought by private party, that title remained

with that party and not with the water authority); *Lain,* 349 S.W.2d at 586 (affirming judgment that private parties had title and possession as against state officials who claimed title on behalf of the state); *Manry v. Robison,* 122 Tex. 213, 56 S.W.2d 438, 448–49 (1932) (determining that State did not own riverbed and that private parties had title thereto); *Tex. River Barges v. City of San Antonio,* 21 S.W.3d 347, 351–52 (Tex.App.-San Antonio 2000, pet. denied) (holding that trial court correctly concluded that river was navigable).

[3]

The dissent accurately notes that *Heinrich*'s ultra vires rule does not apply if the government official's acts were discretionary. The dissent then laments that allowing an ultra vires claim to determine navigability goes beyond *Heinrich* and "abolish[es] immunity altogether." 354 S.W.3d at 399. This incorrectly presumes, however, that a state official's assertion of title is a discretionary act. But navigability (which, here, determines title) "is not a question left to the discretion and judgment of ministerial officers." *Bradford,* 50 S.W.2d at 1070. Rather, "[u]nder the law, *those officers were and are not clothed with the power to settle questions of navigability of streams, but in view of the very nature and importance of the matter, for obvious reasons, it is a question for judicial determination.*" *Id.* (emphasis added).

[4] Government officials cannot choose which properties the State owns; our constitution and statutes set those parameters, and our courts decide whether they have been satisfied. *See Lorino v. Crawford Packing Co.,* 142 Tex. 51, 175 S.W.2d 410, 413 (1943) (observing that lands covered by navigable waters could not be sold by the land commissioner or other ministerial officer; such sale or grant may only be authorized by the Legislature); *see also Manry,* 56 S.W.2d at 449 (denying mandamus relief to party seeking mineral permit from the State, because evidence showed that State did not own riverbed).

In *Lain,* we made clear that a government actor is not immune from a trespass-to-try-title suit, and we described how to bring such a claim. *State v. Lain,* 162 Tex. 549, 349 S.W.2d 579, 581–82 (1961) ("One who takes possession of another's land without legal right is no less a trespasser 396 because he is a state official or *396 employee, and the owner should not be required to obtain legislative consent to institute a suit to oust him simply because he asserts a good faith but overzealous claim that title or right of possession is in the state and that he is acting for an on behalf of the state."). We had earlier held that ultra vires actions remained viable, expressly rejecting the federal courts' approach (which so restricted officer suits and expanded immunity that Congress eventually passed the Quiet Title Act of 1972). *See W.D. Haden Co. v. Dodgen,* 158 Tex. 74, 308 S.W.2d 838, 843 (1958)

[5]; *see also* 28 U.S.C. §§ 2409a, 1346(f), 1402(d).

5 We stated:

> Our quotation of portions of the opinion in [*Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949)] dealing with the contract phase of the case is not to be considered as an approval of the limitation imposed on the rule of *United States v. Lee* as that rule has been adopted and applied by the courts of this state in *Imperial Sugar Co. v. Cabell* [179 S.W. 83 (Tex.Civ.App.-Galveston 1915)] and *State v. Epperson* [121 Tex. 80, 42 S.W.2d 228 (1931)], a limitation vigorously questioned in the dissenting opinion of Mr. Justice Frankfurter. *We have no disposition to extend or broaden the rule of immunity in this state.*
>
> *W.D. Haden Co. v. Dodgen,* 158 Tex. 74, 308 S.W.2d 838, 843 (1958) (emphasis added) (citations omitted).

6. *See* 354 S.W.3d at 392 (noting that the Department "has not done anything that would require it to compensate the Trust if the streambed is not navigable").

7. *See, e.g.,* William V. Dorsaneo, III, *Dorsaneo on Trespass to Try Title Actions, Martin v. Amerman, and H.B. 1787,* 2008 Emerging Issues 759, at *1 (Oct. 17, 2007) (asserting that "it is past time for the abolition of trespass to try title actions as the exclusive method of determining land title disputes generally").

The dissent has conjured an unorthodox takings claim based on the civil and criminal penalties associated with appropriating the State's sand and gravel. There are several problems with this approach. First, if all the government has done is claim title,

a takings claim is premature. *Cf. Hous. N. Shore Ry. Co. v. Tyrrell,* 128 Tex. 248, 98 S.W.2d 786, 793 (1936) (noting that "[i]f the petitioner in condemnation claims the fee title to the property, his petition should be dismissed" because "[u]nless title in the condemnee is admitted the county court is without jurisdiction" (quoting *McInnis v. Brown Cnty. Water Improvement Dist. No. 1,* 41 S.W.2d 741, 744 (Tex.Civ.App.-Austin 1931, writ ref'd))); *see also Wisc. Valley Improvement Co. v. FERC,* 236 F.3d 738, 743–44 (D.C.Cir.2001) (observing that plaintiff could try its title claims in either state court or a federal district court and, if successful, could then pursue a takings claim in the Court of Federal Claims); 2 Nichols on Eminent Domain § 5.02[2][b] (3d ed.2010) ("If petitioners claim title to the land they wish to occupy, a petition for condemnation is not the proper proceeding to institute for the purpose of trying the question."). We have long recognized that "there is irreconcilable inconsistency between an allegation by the condemnor of the entire title, or a paramount title, in himself, and the taking of the property of another by the proceeding; that condemnation rests upon necessity, and there can be no necessity to acquire what one already owns." *Tyrrell,* 98 S.W.2d at 794.

Second, authorizing a takings claim to determine title, when the Department has merely asserted ownership, evades statutory trespass-to-try-title requirements. A trespass-to-try-title suit is generally the only way to resolve contested title claims, even when its requirements have sometimes produced harsh results. Tex. Prop.Code § 22.001(a); *Martin v. Amerman,* 133 S.W.3d 262, 265 (Tex.2004). Whether such strictures are good policy

397 [7] is a question*397 for the Legislature, not the courts. Allowing a party to litigate title through a takings claim will essentially override these statutory requirements.

[7] Tex. Nat. Res.Code § 21.001(3).

8. *See State v. Bradford,* 121 Tex. 515, 50 S.W.2d 1065, 1069 (1932) ("The rule long has been established in this state that the state is the owner of the soil underlying the navigable waters, such as navigable streams, as defined by statute...."). The Department also contends that the Salt Fork on the Trust's property is governed by the "Small Bill", Tex.Rev.Civ. Stat. Ann.. art. 5414a–1, which grants title to the beds of certain "water courses or navigable streams".

9. *Brainard v. State,* 12 S.W.3d 6, 16 (Tex.1999) (citations omitted).

Third, the dissent would hold that a takings claim is viable when the government imposes severe penalties for an individual's legitimate assertion of title. At what point are penalties so severe that a takings action is authorized? A proliferation of lawsuits on "severity" is the predictable consequence of the dissent's approach. Even if the severity of a financial penalty could be defined, rarely will a case arise in which a criminal sanction does not accompany the theft of state property. And even if there were such a case, a landowner would be forced to sell natural resources at its peril, subject to a conversion claim

the State *might* bring. How can a party manage its property without knowing whether it will be subject to liability for doing so?

The issue here is not whether the Department has taken Trust property but who owns the property in the first place. Answering that question will resolve this case, and under longstanding precedent, an ultra vires action—not a takings claim—is the appropriate vehicle for doing so.

Justice HECHT, concurring in part and dissenting in part.

By today's decision, the Court abolishes the State's immunity from suit to determine title to real property. All the plaintiff must do is name some state official as the defendant. The suit proceeds as against a private defendant. Of course, naming a state official instead of the State is a complete fiction. For all practical purposes, the suit is against the State. If the plaintiff's claim is superior to the State's, as advocated by the state official, the plaintiff wins, and the State is bound by the judgment.

In the Court's view, repeated in the concurring opinion, the State has *never* been immune from suit over real property, having announced that ruling fifty years ago in *State v. Lain.*

[1] It is difficult to take this view seriously. For one thing, if it were true, then we should have granted this petition for review when it was first filed and reversed and remanded in a two-page per curiam opinion, as we ordinarily would whenever the court of appeals has ruled directly contrary to an opinion of this Court. Instead, we requested full briefing, denied the petition, granted rehearing, requested more briefing, heard argument, and struggled with the issues. That's a lot of work to apply law that has been settled for fifty years ago.

Moreover, the courts of appeals have been divided in their view of *Lain,* with one reading that decision narrowly,

[2] and three construing it more broadly.

[3] *Lain* unquestionably allows suit against a government official when suit against the
398 government itself would be barred. Less *398 clear is whether, to prevail in a suit against a government official, the plaintiff must prove only that the official is in error in asserting a claim to property on behalf of the government, which is all the plaintiff would be required to prove against a private defendant, or whether the plaintiff must prove more: either that the official abused his discretion in asserting his claim, or that he had no discretion to assert the claim, or that he had no power to act at all. Only because the Court holds today that a plaintiff's burden of proof against a public official is no different than in a suit against a private individual, and the government is bound by a judgment against its officer, does it follow that the government has no immunity from suit.

It is difficult to square the Court's broad reading of *Lain* with its much narrower holding recently in *City of El Paso v. Heinrich.*

[4] There we allowed suit against a city pension fund's trustees in their official capacity for acting *ultra vires* in denying the plaintiff's claim for benefits even though the city, the fund, and the board were all immune from suit.

[5] But "[t]o fall within this *ultra vires* exception," we held, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act."

[6] Because of this restriction, an *ultra vires* suit is an "exception" to the government's immunity from suit; it does not destroy immunity from suit.

Today— *and for the first time*—the Court allows a plaintiff to sue a government official for title to property, and recover in practical effect against the government itself, proving no more than would be required in a suit against a private defendant. The only remaining immunity from suit is in name only: the government cannot be sued, but its actors

can. Why this should be—or as the Court believes, should always have been—the rule for title suits but not for suits for pension benefits, like *Heinrich,* for example, is not clear. Why the government's immunity from suit in tort and contract should be absolute, subject only to statutory waiver, its immunity from suit for the unauthorized actions of its agents should be subject to the narrow *Heinrich* exception, and its immunity from suit over title to real property should be nonexistent is a puzzle to which the Court is strangely oblivious.

I agree with the Court that respondent's declaratory judgment claim fails. In my view, the law affords a practical solution for settling title disputes with the government that preserves immunity while providing a resolution of serious issues. When the government is met with a claim of ownership contrary to its own that it considers serious, it can sue for a resolution, thus waiving immunity. It would be required to sue to protect its own interests. When the government considers its own possible claim not worth asserting, the individual claimant has the property. But when the government claims immunity from suit over title, refuses to sue for a resolution of the dispute, and imposes criminal penalties on the individual claimant for treating the property as his own, the government has removed itself from the proper scope of immunity. In that situation, I would permit the individual claimant to sue for a taking, for which the government has no immunity.

At bottom, I would allow the government to
399 preserve its immunity from suit *399 but would preclude it from making that immunity absolute. Because the Court chooses to abolish immunity altogether, I respectfully dissent.

I

The parties agree that if the Salt Fork of the Red River is "navigable", a term that by statute refers to "a stream which retains an average width of 30 feet from the mouth up",

[7] the State owns the bed on the Sawyer Trust ranch; if not, the Trust owns it.

The bed of a stream is that portion of its soil which is alternatively covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during an entire year, without reference to the extra freshets of the winter or spring or the extreme droughts of the summer or autumn.... [The bed] include[s] all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time....

Determining whether the Salt Fork is "navigable" is not an easy matter. It rises in the Texas Panhandle near Amarillo and flows southeastward some fifty miles to Greenbelt Lake, just north of Clarendon, then extends another hundred miles or so across Texas and Oklahoma to its mouth in the Prairie Dog Town Fork of the Red River.

[10] The Salt Fork crosses the Trust's property just below the Greenbelt Lake dam. No water flows there, except in floods. Even before the dam was built in 1966, there was never enough water in the Salt Fork on the Trust property for regular use.

10 Texas State Historical Ass'n, *Salt Fork of the Red River,* The Handbook of Texas Online, http:// www. tshaonline. org/ handbook/ online/ articles/ rns 05 (last visited Aug. 21, 2011); Texas State Historical Ass'n, *Greenbelt Lake,* The Handbook of Texas Online, http:// www. tshaonline. org/ handbook/ online/ articles/ rog 09 (last visited Aug. 21, 2011); Texas State Historical Ass'n, *Donley County,* The Handbook of Texas Online, http:// www. tshaonline. org/ handbook/ online/ articles/ hcd 10 (last visited Aug. 21, 2011); 30 Tex. Admin. Code § 307.10(3), App. C.

11

11 This evidence offered by the Trust has not been challenged and thus must be taken as true for purposes of resolving the jurisdictional issues before us. *See Tex. Dept. of Parks and Wildlife v. Miranda,* 133 S.W.3d 217, 228 (Tex.2004) ("[I]f the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.").

In 2006, the Trust contracted for the mining of sand and gravel from the dry streambed. But removal of such materials from the bed of a navigable stream requires a $1,200 permit

400 [12] issued by the *400 Texas Parks and Wildlife Department, which may be subject to various conditions.

12 Tex. Parks & Wildlife Code § 86.002(a) ("No person may disturb or take marl, sand, gravel, shell, or mudshell under the management and protection of the commission or operate in or disturb any oyster bed or fishing water for any purpose other than that necessary or incidental to navigation or dredging under state or federal authority without first having acquired from the commission a permit authorizing the activity."); 31 Tex. Admin. Code § 69.104 (stating that with exceptions, "the disturbance of sedimentary materials under the management and protection of the commission must be authorized under the terms and conditions of either an individual or a general permit"); *id.* § 69.114(a) (stating that "applications for permits to take or disturb sedimentary material shall be accompanied by the following nonrefundable application fees: (1) $1,200 for applications to take sedimentary material for purposes of sale").

FN13. *Id.* § 69.111(a) ("The director [of the Department] may make such reasonable requirements of the permittee as required to effectuate the intent of Chapter 86 of the Parks and Wildlife Code.")

FN14. *Id.* § 69.111(b) ("The director shall require the permittee to make a good and sufficient bond payable to the department, and conditioned upon the prompt payment of charges for sedimentary materials and any damage done to property under the ownership or trusteeship of the state.").

FN15. *Id.* § 69.121(a).

FN16. *See* Tex. Parks & Wildlife Code § 11.011 ("The Parks and Wildlife Department is established as an agency of the state. It is under the policy direction of the Parks and Wildlife Commission.").

The permittee must also post a bond

and pay royalties.

The Trust's contractor inquired of the State whether it claimed that the Salt Fork is navigable. When the State would not take a position one way or the other, the Trust sued the Department for a declaration that the Salt Fork is non-navigable. The Department asserted immunity,

still refusing to take a position on navigability, but after a hearing before the district court, it agreed to arrange for the Director of Surveying of the Texas General Land Office to visit the Trust property. He found that all water channels on the property were dry but that at one point the riverbed was 330 feet wide. Based on his brief observations at the site and his review of a few unspecified field notes from the original surveys, he concluded that the Salt Fork is navigable.

401 [17] *401 The trial court refused to dismiss the case, and the court of appeals affirmed.

17 I quote the report of the Director of Surveying in full:

Report of Inspection

Salt Fork of the Red River

Donley County, Texas

A visit was made to the Salt Fork of the Red River in Donley County on August 22, 2006, for the purpose of determining if the stream was statutorily navigable. The

inspection was made at a point approximately 4.7 miles north of Clarendon and less than one mile downstream from the dam creating Greenbelt Lake. Bob Sweeney, an attorney for the Parks & Wildlife Department, and I met with the landowner, a Mr. Sawyer, and his surveyor, Maxey Sheppard, LSLS.

The Salt Fork of the Red River is a "Small Bill" stream. All of the original land surveys in the vicinity cross the river even though, in the vicinity of the inspection site, the stream bed widths recited in the patent field notes for the original surveys vary from a minimum of 70 varas (194 feet) to as much as 453.5 varas (1260 feet) and at a point 5 miles west, above Greenbelt Lake, there is a reported width of 463 varas (1286 feet).

The inspection point on the river was in the vicinity of the southwest corner of G.C. & S.F. Ry. Co. Survey No. 7, Abstract No. 282, in the east line of the Socorro Irrigation Co. Survey No.5, Abstract No. 238. Aerial photography indicates that, at this point, the river is separated into two channels by a rather large island. Only the north channel was inspected.

As with many high plains streams, the Salt Fork of the Red River is a wide sand-bed river with numerous channels lying between the river banks. The area of inspection was less than one mile below the dam creating Greenbelt Lake and at this point the riverbed is dry except when occasional releases are made from the lake. The riverbed at the point of inspection is vegetated from bank to bank but not with typical upland vegetation. The banks of the stream are well defined on both sides of the bed. There exist at least three separate water channels between the banks but all of them are dry at this time. The portion of the riverbed north of the island at the point of inspection was found to be approximately 330 feet in width.

Based on the above-recited observations, it is my opinion that the Salt Fork of the Red River is a statutorily navigable stream at this point.

/s C.B. Thomson

C.B. Thomson, LSLS, RPLS, PE

Director of Surveying

Texas General Land Office

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18 354 S.W.3d 489 (Tex.App.-Amarillo 2007).

FN19. *Ante* at 393 (citing *City of El Paso v. Heinrich,* 284 S.W.3d 366, 372–373 (Tex.2009), and *State v. Lain,* 162 Tex. 549, 349 S.W.2d 579, 582 (1961)).

FN20. *Id.*

FN21. *Ante* at 387.

FN22. *See Federal Sign v. Tex. S. Univ.,* 951 S.W.2d 401, 413–415 (Tex.1997) (Hecht, J., concurring) (stating that the decision whether to waive immunity from suit on a contract "involves policy choices more complex than simply waiver of immunity" and that "the Legislature ... is better suited to deciding the kinds of political issues that ... attend claims against the State").

FN23. *Lain,* 349 S.W.2d at 581.

FN24. *Heinrich,* 284 S.W.3d at 371.

II

I agree with the Court that the Trust's suit against the Department to determine title to the bed of the Salt Fork is barred by immunity.

In *State v. Lain,* we held that "[w]hen in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign immunity should be sustained in limine."

For the reasons the Court explains, the State's immunity from land claims is not waived by the Declaratory Judgment Act.

Immunity in this context serves important purposes. It preserves the separation of powers between the Legislative and Judicial Departments

by limiting courts' authority to decide policy matters that may attend disputes over the State's ownership of property.

Immunity also respects the Executive Department's authority and discretion to handle property dispute issues on a consistent and comprehensive basis. In this case, for example, a decision on the navigability of the Salt Fork would have ramifications for other landowners, not only up and down the Salt Fork, but adjacent other streams as well. And immunity protects the State from the burdens of litigation that would require diversion of limited revenues from other purposes considered more important.

I also agree that immunity would not bar an *ultra vires* action by the Trust against an appropriate official for asserting the State's ownership of the bed contrary to law. Again, *Lain* holds:

Well reasoned and authoritative decisions of the Supreme Court of the United States and of the courts of this state support the view that a plea of sovereign immunity by officials of the sovereign will not be sustained in a suit by the owner of land having the right of possession when the sovereign has neither title nor right of possession.

We recently reconfirmed in *City of El Paso v. Heinrich* that *ultra vires* actions are permissible,

but history teaches that the line between such actions and actions for which the government retains immunity is hard to draw. The specific Supreme Court decision to which *Lain* referred was *United States v. Lee,*

[25] in which the Court, 5–4, upheld a suit against federal officials to void the seizure of General Robert E. Lee's wife's Arlington estate for nonpayment of $92.07 taxes after it had been sold to the United States for $26,800 for use as a national cemetery. *Lee* was the most *402 celebrated case of several over many years in which the Court attempted to set out exactly when a suit for land from which the United States is immune could be brought against a government official. Toward the end of this exercise, the Court admitted that it had been "inconsistent"

[25] 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882).

FN26. *Block v. North Dakota,* 461 U.S. 273, 281, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983).

FN27. *Id.* (quoting *Malone v. Bowdoin,* 369 U.S. 643, 646, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962)).

in determining whether to allow "officer suits", observing that "it is fair to say that to reconcile completely all the decisions of the Court in this field ... would be a Procrustean task."

Eventually, the Supreme Court "cut through the tangle" of its decisions and applied to land disputes the general rule it had announced for officer suits in *Larson v. Domestic & Foreign Corp.:*

[28]

[28] 337 U.S. 682, 702, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

FN29. *Block,* 461 U.S. at 281, 103 S.Ct. 1811 (quoting *Malone,* 369 U.S. at 647, 82 S.Ct. 980, in turn quoting *Larson,* 337 U.S. at 702, 69 S.Ct. 1457) (internal quotation marks omitted).

the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

The difficulty with respect to land disputes evaporated with Congress' passage of the Quiet Title Act of 1972,

[30] which waived the federal government's immunity from suits for land under certain conditions but also provide[d] the exclusive means

by which adverse claimants [can] challenge the United States' title to real property.

30 Act of Oct. 25, 1972, Pub.L. No. 92–562, 86 Stat. 1176 (codified at 28 U.S.C. § 2409a, 28 U.S.C. § 1346(f), and 28 U.S.C. § 1402(d)).

FN31. *Block,* 461 U.S. at 286, 103 S.Ct. 1811.

FN32. *Heinrich,* 284 S.W.3d at 371.

FN33. *See Bradford,* 50 S.W.2d at 1069 (stating that a determination of navigability will not be held void where "the surveying officers ... made the surveys in the exercise of their discretion and honest judgment").

FN34. *See Brainard v. State,* 12 S.W.3d 6, 10 (Tex.1999) ("The differences between the parties' surveys (and, in particular, their chosen river banks) are based on conflicting legal theories that we must resolve.").

The Texas Legislature has not acted similarly to free us of the continuing struggle to determine when government officers may be sued though the government is immune. We held in *City of El Paso v. Heinrich* that an *ultra vires* suit is permitted when a government official has acted contrary to a statute requiring him to "perform[ ] in a certain way, leaving no room for discretion".

This rule may not be as restrictive as the rule in *Larson,* as its application depends on the difficult decision of what is properly within an official's discretion and what lies beyond. Locating the banks of a stream to determine navigability may

or may not

involve discretion; determining from a single measurement and a few surveys that "a stream retains an average width of 30 feet from the mouth up"

35 may be an abuse of discretion. But we cannot decide these issues here because the Trust has not brought an *ultra vires* action. The Department insists that a discretionary determination was made and that any *ultra vires* action the Trust may assert will fail. The Court removes that argument by holding that an appropriate state official may

403 *403 be sued, just as a private person would be, and judgment rendered against the State.

35 Tex. Nat. Res.Code § 21.001(3).

FN36. *See* Tex. Civ. Prac. & Rem.Code §§ 107.001–.005 (providing framework for legislative consent to sue).

FN37. *Brainard,* 12 S.W.3d at 10.

FN38. *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 375–376 (Tex.2006) ("[I]t would be fundamentally unfair to allow a governmental entity to assert affirmative claims against a party while claiming it had immunity as to the party's claims against it."); *Anderson, Clayton & Co. v. State,* 122 Tex. 530, 62 S.W.2d 107, 110 (1933) ("[W]here a state voluntarily files a suit and submits its rights for judicial determination it will be bound thereby and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy.").

FN39. *Moore v. Jet Stream Investments, Ltd.,* 261 S.W.3d 412, 428–429 (Tex.App.-Texarkana 2008, pet. denied)

FN40. *Bennett v. Reynolds,* 315 S.W.3d 867, 871–872 (Tex.2010); Tex. Civ. Prac. & Rem.Code § 41.003(a) (stating that, with exceptions, "exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence"); *id.* § 41.001(7) (" 'Malice' means a specific intent by the defendant to cause substantial injury or harm to the claimant.").

III

The Department contends that there are only two ways for the Trust to challenge the State's assertion of ownership of the Salt Fork bed. One is for the Trust to seek permission from the Legislature to sue.

The Department concedes that this may be difficult, citing only one instance in which the Legislature has ever granted consent in similar circumstances.

But it argues that the difficulty is justified by the important purposes immunity serves.

The Trust's only other alternative, the Department contends, is to proceed with its mining plans and risk the consequences. This is not simply a dare. The Department might reconsider its claim of ownership or otherwise decide to take no action against the Trust. Or the Department might sue for damages, in which case it would not be immune from the Trust's counterclaim to determine title.

The Department would have to determine whether its claim was strong enough to justify losing-the expense of litigation as well as the ramifications of an adverse decision. If the Department prevailed on a claim for common-law conversion, the Trust would be liable, if it acted in good faith, for only the net value of the property taken, and if it did not act in good faith, for the gross value of the property and the Department's expenses in recovering it.

The Trust would not be liable for punitive damages unless it acted with malice.

The Trust would have to evaluate whether the strength of its claim justified its exposure or whether it would be to its benefit in the long run to apply for a permit and pay the State a royalty. A Department-initiated suit for conversion presenting roughly correlative risks to each side preserves immunity and the purposes its serves while providing a viable mechanism for resolving the ownership dispute.

But conversion would not be the only action available to the Department, nor would the Trust's risk be limited to common-law damages. By statute, a person who removes sand and gravel belonging to the State without a permit may also be liable for consequential damages

404 [41] as well *404 as "a civil penalty of not less than $100 or more than $10,000 for each act of violation and for each day of violation".

41 Tex. Parks & Wildlife Code § 86.023 "A person who takes marl, sand, gravel, shell, or mudshell under the jurisdiction of the commission in violation of this chapter or a rule adopted under this chapter is liable to the state for the value of: (1) the material taken; and (2) any other natural resource under the department's jurisdiction that is damaged or diminished in value.".

FN42. *Id.* § 86.024.

FN43. *Id.* § 86.022 ("A person who violates Section 86.002 [that is, mines sand and gravel without a permit] ... commits an offense that is a Class C Parks and Wildlife Code misdemeanor.").

FN44. *Id.* §§ 12.406 ("An individual adjudged guilty of a Class C Parks and Wildlife Code misdemeanor shall be punished by a fine of not less than $25 nor more than $500."); 86.002(b) ("Each day's operation in violation of this section constitutes a separate offense.").

FN45. *Ante* at 391.

FN46. *Ante* at 392.

FN47. *Ante* at 392.

Further, mining the State's sand and gravel without a permit is a crime

punishable by a fine of $25 to $500 per day.

With the addition of these statutory civil and criminal penalties, the State has gone to some lengths to discourage any provocation for it to litigate ownership disputes.

The Trust argues for a third alternative: a suit for a taking of its property without compensation in violation of article I, section 17 of the Texas Constitution. The Department acknowledges that it is not immune from such suits but argues that the Trust cannot sue for a taking in this situation. The Court agrees for what I take to be three reasons.

First, the Court notes that "the State has not expressed an intent to take property belonging to the Trust [but] ... has merely identified the streambed as belonging to the State".

But to say that the State is claiming only what it owns obviously begs the question. The Department argues that the government cannot have the intent to take property necessary to trigger a constitutional right to compensation as long as it reasonably believes it owns the property, but the Court does not even require that government's belief be reasonable. And this case illustrates what the Department means by reasonable belief: from one measurement of the dry riverbed on the Trust's property and a few unidentified field notes, one can infer that the Salt Fork has an average width of thirty feet from the mouth up. With no more basis than that, the Department's assertion of ownership is little more than a grab. The rule the Court implicitly applies is that the State never takes something it claims to own, however unfounded the claim may be. The government cannot avoid its constitutional responsibility simply by wishful thinking.

Second, the Court states that "[t]he Trust's suit is an action to determine whether it owns the streambed, not one for compensation".

But the fact that the Trust *has not sued* for compensation to date does not mean that it *cannot sue* for a taking in this situation. The Trust *has not sued* a state official, yet the Court explains at length that the Trust *could* bring an *ultra vires* action. There is no less reason to consider whether the Trust *could sue* the Department for a taking if it asserted a claim for compensation. This case is not about pleadings; it is about immunity.

Third, the Court argues that "[a]llowing the Trust's claim of title to be adjudicated by means of a takings claim would sanction claimants' circumventing the State's sovereign immunity by ... [c]reative pleading...."

But it may just as well be said that allowing the State to assert immunity from a takings suit
405 merely because it *405 claims title would sanction the State's circumvention of its constitutional responsibility. If a takings claim—which the Department concedes immunity would not bar—can be asserted even though title is disputed, then its assertion cannot be dismissed as creative pleading.

Not only does the Court offer no persuasive reason for holding that the Trust has no takings claim,

[48] it allows a contrary result in a similar case to stand by denying the petition for review today in *Koch v. Texas General Land Office.*

[48] The Department also argues that if the Trust had a constitutional claim, it would be for a regulatory taking because the Trust's only complaint is that it must obtain a permit for its proposed mining operations. "Physical possession is, categorically, a taking for which compensation is constitutionally mandated, but a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking." *Sheffield Development Co., Inc. v. City of Glenn Heights,* 140 S.W.3d 660, 669–670 (Tex.2004) (footnote omitted). The Department contends that because the Trust has not pleaded and cannot show that the permit requirement severely impacts the value of the property, it has no regulatory takings claim. *See id.* at 672–673. But the disagreement between the Trust and the

Department is over ownership of the riverbed, not the requirement of a permit to mine it. This is not a regulatory takings case.

[49] There, Koch sued the General Land Office for taking limestone from her land for highway construction. The State claimed ownership of the limestone because its 1926 land patent to Koch's predecessor reserved "[a]ll of the minerals", despite our holding in a 1949 case that ordinary limestone is not a mineral.

49 273 S.W.3d 451 (Tex.App.-Austin 2008, pet. denied).

FN50. *Heinatz v. Allen,* 147 Tex. 512, 217 S.W.2d 994, 997 (1949) ("In our opinion substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value, as for example sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement. Such substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word.").

FN51. *Koch,* 273 S.W.3d at 458.

FN52. *Id.* at 458–459.

FN53. *Id.* (citing *Porretto v. Patterson,* 251 S.W.3d 701, 709–710 (Tex.App.-Houston [1st Dist.] 2007, no pet.) (holding that a person claiming ownership of property could sue the State for a taking for having leased it); *Kenedy Mem'l Found. v. Mauro,* 921 S.W.2d 278, 282 (Tex.App.-Corpus Christi 1995, writ denied) (holding that immunity did not bar a takings claim merely because the State disputed the plaintiff's ownership of the property). This Court later noted in *Kenedy,* however, that the State's immunity had been waived by statute. *Kenedy Mem'l Found. v. Dewhurst,* 90 S.W.3d 268, 289 & n. 71 (Tex.2002)).

FN54. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

The GLO argued that the rule in that case should not apply retroactively or to the State, that it therefore had a colorable claim to the limestone, and that "if the State believes it is the owner of property, its use of that property cannot be an intentional act to take the property of another."

The court rejected this Cartesian *credo ergo capio* argument:

We are not persuaded that the State's subjective belief regarding its title to property, by itself, changes or dictates the capacity in which the State acts.... When a plaintiff alleges a state taking of property and title to that property is in dispute, the State cannot evade its constitutional obligations merely by asserting that it "believes" it is acting as landowner rather than as sovereign regardless of whether that belief is, in fact, accurate. Otherwise, the State would be in the position of unilaterally determining the outcome of takings disputes simply by declaring a subjective belief—whether right or wrong—that it thought it owned the property.

The court noted that two other courts had held that a dispute over the ownership of property does not preclude a suit for its taking.

406 *406

Koch and the present case are quite similar. The ownership issue in *Koch* was purely legal: what did "mineral" mean in the State's land patent. The ownership issue in the present case may be partly legal—what standards govern the measurements made to determine navigability—and partly factual—the actual measurements themselves. But the basic nature of the issues in the two cases is the same. In both cases, the State argues that it cannot take property it reasonably believes it owns, but the bases for its belief are shaky: in *Koch* it claims that limestone is a mineral in the face of a contrary decision from this Court, and in

the present case it claims that the Salt Fork is thirty feet wide on average, source to mouth, on the strength of one measurement and some unidentified notes. And although Koch sued for damages while the Trust has sought only declaratory and injunctive relief, nothing would prevent the Trust from adding a claim for damages.

In *Koch,* the State actually removed the limestone, while here, the State has only asserted that the Trust cannot remove sand and gravel without a permit. But in both cases, the State claims ownership of the property in issue. A permit to remove sand and gravel is required, not for the purpose of regulating a landowner's use of his own property, but to protect the State's right to its property. The imposition of a royalty in connection with the permit is based on the State's ownership of the material being mined. The State claims the right to remove sand and gravel from the Trust ranch, just as it removed limestone from Koch's property, only it has not yet chosen to exercise that right. At bottom, this distinction in the two cases is one without a difference.

In my view, an action for a constitutionally compensable taking of property is not precluded merely by a dispute between the claimant and the government over ownership of the property. To hold otherwise would allow the government to avoid its constitutional obligation whenever it chose to do so. Nor do I think a takings action can be precluded when the government's belief in its right to the property is colorable or even reasonable. Such a rule would depreciate the constitutional right too much. On the other hand, to hold that the government's claim to property may always be challenged in a takings action would vitiate the rule of *Lain,* that the government is immune from such suits, and abolish any need for *ultra vires* actions. It is not necessary to go that far in this case.

The dilemma presented here results not from the State's assertion of immunity as a shield to prevent being drawn into litigation, but its use as a sword to discourage all claims to streambeds. By imposing statutory damages and civil and criminal penalties for mining a streambed without a permit, the State has all but prohibited a claimant from acting on a right asserted in good faith and risking the consequences in an action brought by the State. Legislative consent to sue for title is thus made virtually absolute. The effect is to shift authority for determining whether the State has taken a person's property without compensation from the Judicial Department to the Legislative Department, in violation of the fundamental principle that it is for the courts to decide what the
407 *407 constitution requires.

In these circumstances, I would hold that a takings action must be allowed. If the State loses that action, it must pay for property it might prefer not to have. Thus as a practical matter, the availability of a takings action forces the State to consider more carefully the strength of its claim. The State may statutorily increase the punishment for conversion, but it does so at the risk of incurring damages for insubstantial claims of ownership.

For these reasons, I would hold that the Trust may assert a claim for compensation against the Department under article I, section 17 of the Constitution. From the Court's decision to waive the State's immunity completely, I respectfully dissent.

* * *

Tex. Civ. Prac. & Rem. Code § 12.002

Section 12.002 - Liability

(a) A person may not make, present, or use a document or other record with:

(1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;

(2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and

(3) intent to cause another person to suffer:

(A) physical injury;

(B) financial injury; or

(C) mental anguish or emotional distress.

(a-1) Except as provided by Subsection (a-2), a person may not file an abstract of a judgment or an instrument concerning real or personal property with a court or county clerk, or a financing statement with a filing office, if the person:

(1) is an inmate; or

(2) is not licensed or regulated under Title 11, Insurance Code, and is filing on behalf of another person who the person knows is an inmate.

(a-2) A person described by Subsection (a-1) may file an abstract, instrument, or financing statement described by that subsection if the document being filed includes a statement indicating that:

(1) the person filing the document is an inmate; or

(2) the person is filing the document on behalf of a person who is an inmate.

(b) A person who violates Subsection (a) or (a-1) is liable to each injured person for:

(1) the greater of:

(A) $10,000; or

(B) the actual damages caused by the violation;

(2) court costs;

(3) reasonable attorney's fees; and

(4) exemplary damages in an amount determined by the court.

(c) A person claiming a lien under Chapter 53, Property Code, is not liable under this section for the making, presentation, or use of a document or other record in connection with the assertion of the claim unless the person acts with intent to defraud.

Tex. Civ. Prac. and Rem. Code § 12.002

Amended by Acts 2009, 81st Leg., R.S., Ch. 1260, Sec. 1, eff. 9/1/2009.
Amended by Acts 2007, 80th Leg., R.S., Ch. 895, Sec. 2, eff. 9/1/2007.
Added by Acts 1997, 75th Leg., ch. 189, Sec. 16, eff. 5/21/1997. Renumbered from Civil Practice & Remedies Code Sec. 11.002 by Acts 1999, 76th Leg., ch. 62, Sec. 19.01(3), eff. 9/1/1999.

Tex. Civ. Prac. & Rem. Code § 12.001

Section 12.001 - Definitions

In this chapter:

(1) "Court record" has the meaning assigned by Section 37.01, Penal Code.
(2) "Exemplary damages" has the meaning assigned by Section 41.001.
(2-a) "Filing office" has the meaning assigned by Section 9.102, Business & Commerce Code.
(2-b) "Financing statement" has the meaning assigned by Section 9.102, Business & Commerce Code.
(2-c) "Inmate" means a person housed in a secure correctional facility.
(3) "Lien" means a claim in property for the payment of a debt and includes a security interest.
(4) "Public servant" has the meaning assigned by Section 1.07, Penal Code, and includes officers and employees of the United States.
(5) "Secure correctional facility" has the meaning assigned by Section 1.07, Penal Code.

Tex. Civ. Prac. and Rem. Code § 12.001

Amended by Acts 2007, 80th Leg., R.S., Ch. 895, Sec. 1, eff. 9/1/2007.
Added by Acts 1997, 75th Leg., ch. 189, Sec. 16, eff. 5/21/1997. Renumbered from Civil Practice & Remedies Code Sec. 11.001 by Acts 1999, 76th Leg., ch. 62, Sec. 19.01(3), eff. 9/1/1999.

Tex. Civ. Prac. & Rem. Code § 16.004

Section 16.004 - Four-Year Limitations Period

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

(1) specific performance of a contract for the conveyance of real property;

(2) penalty or damages on the penal clause of a bond to convey real property;

(3) debt;

(4) fraud; or

(5) breach of fiduciary duty.

(b) A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian.

(c) A person must bring suit against his partner for a settlement of partnership accounts, and must bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than four years after the day that the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day that the dealings in which the parties were interested together cease.

Tex. Civ. Prac. and Rem. Code § 16.004

Amended by Acts 1999, 76th Leg., ch. 950, Sec. 1, eff. 8/30/1999.
Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. 9/1/1985.

Tex. R. Civ. P. 301

Rule 301 - Judgments

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

Tex. R. Civ. P. 301

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